MARINE INSURANCE

MARINE INSURANCE:

ITS PRINCIPLES AND PRACTICE

BY

FREDERICK TEMPLEMAN

ADJUSTER OF MARINE CLAIMS TO THE ALLIANCE ASSURANCE COMPANY, LTD.

THIRD EDITION

LONDON

MACDONALD AND EVANS

4, ADAM STREET, ADELPHI, W.C.

1912

PREFACE TO THE THIRD EDITION

THE demand for this little work has now called for a Third Edition, which has accordingly been prepared. It has, within the limitations of a handbook, been brought up to date, and it is hoped that its usefulness will thereby be increased.

F. T.

London, August 1912.

PREFACE TO THE SECOND EDITION

THAT this handbook supplies a want is shown by the fact that the first Edition has been exhausted. A second and revised Edition has, therefore, now been prepared, and it is hoped that it may be found of increased usefulness.

The Association of Average Adjusters has kindly permitted me to add as an Appendix the Rules of Practice of that Association, for which courtesy I desire to record my thanks. The Marine Insurance Act, to which special attention is invited, and the York-Antwerp Rules, are also included as Appendices.

F. T.

London, 1st June 1909.

PREFACE TO THE FIRST EDITION

In a few prefatory words I desire to express my sense of the honour conferred upon me by the London Chamber of Commerce in inviting me to give a series of five lectures on the subject of "Marine Insurance: its principles and practice," in connexion with their scheme for promoting Higher Commercial Education. This invitation I accepted with mingled gratification and diffidence—with gratification on account of the honour to which I have referred, but with diffidence owing to my doubt as to my qualifications for such an undertaking, especially after the able and lucid Introductory Lecture. The large number of listeners who attentively followed this course of lectures was ample proof that the object did not lack appreciation, and decided the Council of the Chamber of Commerce to do me the further honour to publish the lectures in handbook form.

To obtain a practical understanding of the subject of Marine Insurance, it is necessary to have an accurate knowledge of the scope of the contract, and of the meaning of its terms; of the manner in which claims arise under it, and how those claims are in practice dealt with. And these were the objects of my lectures, now reduced to the form of this small elementary treatise. Space has not enabled me to discuss every point, nor to deal exhaustively with all the points discussed. I have, however, where space permitted, given a short outline of some of the leading legal decisions which elucidate the important points with which they severally deal.

In order to guard against any possible misapprehension, I think it well to observe that this handbook is written by me in my personal private capacity, and must not be regarded as expressing an opinion or view of the Association of Average Adjusters, of which Association I have the privilege to be the Secretary.

To Mr. Douglas Owen for his valuable suggestions during the preparation of my lectures, and to Mr. William Richards for his kindness in having carefully gone through the proof-sheets of this handbook, I desire to express my grateful thanks.

F. T.

TABLE OF CASES CITED

COPY OF LLOYD'S FORM OF POLICY

Be it known that

as well in own Name, as for and in the Name and Names of all and every other Person or Persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance and cause and them and every of them to be insured, lost or not lost, at and from

S.G.

£

upon any kind of Goods and Merchandises, and also upon the Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat and other Furniture, of and in the good Ship or Vessel called the

whereof is Master, under God, for this present voyage,
or whosoever else shall go for Master in the said Ship, or by whatsoever other Name or Names the same Ship, or the Master thereof, is or shall be named or called, beginning the adventure upon the said Goods and Merchandises from the loading thereof aboard the said Ship

upon the said Ship, etc.,
and shall so continue and endure during her Abode there, upon the said Ship, etc.; and further, until the said Ship, with all her Ordnance, Tackle, Apparel, etc, and Goods and Merchandises whatsoever shall be arrived at

upon the said Ship, etc., until she hath moored at Anchor Twenty-four Hours in good Safety, and upon the Goods and Merchandises until the same be there discharged and safely landed; and it shall be lawful for the said Ship, etc., in this Voyage to proceed and sail to and touch and stay at any Ports or Places whatsoever

without Prejudice to this Insurance. The said Ship, etc., Goods and Merchandises, etc., for so much as concerns the Assured by Agreement between the Assured and Assurers in this Policy, are and shall be valued at

Touching the Adventures and Perils which we the Assurers are contented to bear and do take upon us in this Voyage, they are, of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints, and Detainments of all Kings, Princes, and People, of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses, and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Goods and Merchandises and Ship, etc., or any part thereof; and in case of any Loss or Misfortune, it shall be lawful to the Assured, their Factors, Servants and Assigns, to sue, labour, and travel for, in, and about the Defence, Safeguard and Recovery of the said Goods and Merchandises and Ship, etc., or any part thereof, without Prejudice to this Insurance; to the Charges whereof we, the Assurers, will contribute, each one according to the Rate and Quantity of his sum herein assured. And it is especially declared and agreed that no acts of the Insurer or Insured in recovering, saving, or preserving the property insured, shall be considered as a waiver or acceptance of abandonment. And it is agreed by us, the Insurers, that this Writing or Policy of Assurance shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London.

Warranted nevertheless free of capture, seizure and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.

And so we the Assurers are contented, and do hereby promise and bind ourselves, each one for his own part, our Heirs, Executors, and Goods, to the Assured, their Executors, Administrators, and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the Assured
at and after the Rate of

IN WITNESS whereof, we the Assurers have subscribed our Names and Sums assured in

N.B.—Corn, Fish, Salt, Fruit, Flour, and Seed are warranted free from Average, unless general, or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins are warranted free from Average under Five Pounds per Cent.; and all other Goods, also the Ship and Freight, are warranted free from Average under Three Pounds per Cent., unless general, or the Ship be stranded.

CONTENTS

MARINE INSURANCE:

ITS PRINCIPLES AND PRACTICE

CHAPTER I

THE CONTRACT OF MARINE INSURANCE

THE Contract of Marine Insurance is, theoretically, a Contract of Indemnity. Whereas in the case of Fire Insurance the indemnity is, speaking generally, regarded as limited to the actual loss sustained, in Marine Insurance it is ordinarily based on values agreed upon in advance, which values may be greater or less than the values actually at risk. In consideration of the payment of a certain sum called the "Premium" the underwriter agrees to indemnify the assured against loss or damage caused by certain specified perils, sometimes called perils of the sea, but which would be more accurately described as "perils insured against," inasmuch as some of the risks insured against are not sea risks at all.

The document embodying the contract of insurance is called the "Policy," and it has been described as "a contract of indemnity against all losses accruing to the subject-matter of the policy from certain perils during the adventure."[1]

[1] Lord Blackburn in *Lloyd* v. *Fleming*, (1871) I. Asp., M.L.C. 193.

Marine Policies, though commonly in one form, are of different kinds, and are known by different names, according to the manner in which they are executed, or the risks which they are intended to cover. It is necessary, therefore, to give a brief explanation of the meaning of the various descriptions applied to marine policies.

An "Interest" Policy is one which shows clearly that the assured has a specific, real, and substantial interest at risk, as, for example, an insurance on 50 bales wool, 1,000 bags rice or 100 chests tea.

A "Voyage" Policy, in contradistinction to a "time" policy, is one in which the limits of the risk are defined by termini or places, the subject-matter of the insurance being insured for a particular voyage: as, for example, London to Bombay, or New York to Liverpool.

A "Construction" Policy, sometimes known as a "Builders' Risk," is one which covers risks incidental to the construction or building of vessels. This class of insurance is usually effected in connexion with the building of battle-ships and large liners, and therefore huge amounts are involved. And the period of time covered by these policies is likewise considerable.

A "Time" Policy is one which expresses the insurance as being for a specified period of time, as for example, from noon 1st January 1911, to noon 1st January 1912. This kind of insurance is generally resorted to in the case of hulls, etc., of vessels, though in some cases shipowners prefer to insure their vessels for each separate voyage, under a "voyage" policy.

A "Port" Policy is one which covers a vessel for a period of time whilst in port, in contradistinction to being exposed to the risk of a voyage and the perils of navigation incidental thereto.

A "Valued" Policy is one where an agreed value (not

necessarily the actual value) of the thing insured is inserted in the policy : as on goods valued at £1,000, or on hull, etc., valued at £10,000.

An "Open" or "Unvalued" Policy is, to be exact, one in which the value of the subject-matter of the insurance is not stated, but left to be ascertained and proved. This form of policy is, however, not frequently met with. But the term "open" policy is now generally applied to what is, strictly speaking,

A "Floating" Policy. An "Open" or "Floating" policy is one in which no name of any special vessel is inserted, it being stated to attach to any "*Ship* or *Ships*," or "*Steamer* or *Steamers*," to be declared for a certain specified voyage. The names of the vessels and details of the interest attaching to them are subsequently declared by endorsement on the policy, and are termed "declarations," these being initialled by the underwriter to show that they have been noted and approved. It is also to be well borne in mind that in the case of all "Open" or "Floating" policies, it is a fundamental principle and understanding that all shipments which should attach are to be declared thereunder by the assured. He must not declare some, and run his own risk upon, or insure, others elsewhere, any more than he can wait and see what vessels arrive with a view to declaring only those vessels which are lost, or shipments that have arrived damaged. And in the event of loss before declaration, the amount to be declared must be computed in accordance with the provisions of the policy, or in exactly the same manner as that in which the values of previous declarations have been arrived at.

Lastly, a **"Wager" Policy** is one which bears evidence on the face of it either that the assured has strictly no insurable interest at stake, or else that the underwriter is

willing to dispense with any proof of interest, such words as "Policy proof of Interest" (the initials of which give the key to the familiar "P.P.I." policies) or "Interest or no Interest," or other expression or words to like effect, being inserted in the policy for this purpose. All "wager" insurances are void according to statute.[1] Although valueless in a court of law, they nevertheless continue to be executed, and inasmuch as there is no legal obligation on the underwriter to be bound by the policy, and as it would be open to him, if he so willed, to repudiate the contract altogether, such policies probably inspire on the part of underwriters more than ordinary respect. They are regarded as a record of an obligation not of law but of honour between the parties, and are therefore termed "Honour" policies. Such insurances undoubtedly supply a commercial convenience in cases where there exists some interest which is difficult, perhaps incapable, of actual proof (for example, an insurance against the risk of an increased Government duty or of the taxation of articles previously duty-free). But P.P.I. policies have been frequently resorted to as a means of gambling, pure and simple, and with a view to suppressing this abuse the Marine Insurance (Gambling Policies) Act, 1909—"an Act to prohibit Gambling on Loss by Maritime Perils"—has been passed.[2]

Good Faith. Concealment

The essential feature of a contract of marine insurance, as of every other contract, is good faith, and if the utmost good faith be not observed by either party, the contract may be avoided by the other party. Fraud invalidates the insurance, and deprives the party committing it of all

[1] Marine Insurance Act, § 4, p. 164 *infra*.
[2] *Vide* Appendix B, p. 203 *infra*.

his rights arising out of the contract. The relations existing between an insurer and his underwriter are such that a full disclosure of all the facts concerning the risk must be made.[1] Such details as do not affect the risk need not, of course, be communicated, nor such information as an ordinary underwriter is presumed to possess in the usual course of his business. But any circumstance which is within the knowledge of the person insuring and likely to influence the underwriter as to the desirability of accepting or declining the risk, or of arriving at the amount of premium which he will charge for accepting it, must be fully divulged. Such circumstances are known as "material facts." Should there be any concealment the underwriter may avoid the contract.[2]

Misrepresentation

Misrepresentation is equally fatal to the contract. If it should happen, however, that the policy has been avoided by misrepresentation not amounting to moral fraud, the assured will be entitled to a return of the premium: but no such return of premium would be made if it transpired that such misrepresentation had been made with a view to deceive.

IMPLIED WARRANTIES[3]

There are certain essential conditions, or so-called "warranties," which must be complied with in order to render a contract of marine insurance valid. They are not expressed but they are tacitly understood, and are

[1] Cf. *Thames and Mersey M. I. Co.* v. *Gunford Ship Co.* (1911), XVI. Com. Cas., 270, XII. Asp. M.L.C., 49.

[2] *Vide* Marine Insurance Act, § 18, p. 168 *infra*.

[3] As to Warranties generally, cf. Marine Insurance Act, § 33 *et seq.*, p. 174 *infra*.

called "Implied Warranties." They are most important, as non-compliance with any one of them is also fatal to the contract.

These implied warranties are two in number, and their purport may be expressed as follows, viz.—

i. In every voyage policy, that the vessel shall be seaworthy when the risk commences: or if the voyage be divisible into distinct stages, at the commencement of each stage.

ii. That the adventure shall in all respects be a legal one, and the ship properly documented.

It will be well to consider these implied warranties *seriatim*.

Seaworthiness

In every "voyage" policy on hull or cargo there is an implied warranty that at the commencement of the voyage the vessel shall be seaworthy, *i. e.* reasonably fit in all respects to encounter the ordinary perils of the adventure insured. And in the case of insurances on cargo there is also a further implied warranty that the vessel is reasonably fit to carry the particular cargo to the destination contemplated by the policy.[1] There is, however, no implied warranty of seaworthiness in an ordinary "time" policy on a vessel's hull, the reason for this being that it often happens that when a "time" policy first attaches the vessel is at sea, and consequently the owner is not in a position to guarantee her condition. In the case of a "time" policy, however, if *with the privity of the assured* the vessel is sent to sea in an unseaworthy state, the underwriter is not liable for any loss attributable to unseaworthiness.[2]

In the case of insurances on the hull, etc., of a vessel,

[1] *Vide* Marine Insurance Act, § 40 (2), p. 176 *infra*.

[2] *Ibid.*, § 39 (5), p. 176 *infra*.

or on goods, for "voyage," the warranty of seaworthiness must be literally complied with, although in practice it is not rigidly enforced in the case of cargo where an innocent shipper has sustained loss through no fault of his own.[1] Strictly speaking, neither ignorance nor innocence will absolve the assured from the consequences of a breach of the warranty. In the case of insurance on ship, the shipowner may, in fact, have done everything within his power to ensure that his vessel is in every way fit for the voyage, and yet some latent defect, which every care would fail to discover, would, in the absence of any special stipulation in the policy, defeat his object, and deprive him of his right to recover for a loss. An instance of this was provided in the case where a ship had been insured for the voyage from Montreal to Halifax, N.S. When she sailed there was an undiscovered defect in her boiler, which became visible on the passage down the River St. Lawrence. The defect subsequently became so serious as to disable her, and necessitated her returning to Montreal for repair. After the repairs had been effected the vessel resumed her voyage, and she was subsequently lost in bad weather. In these circumstances it was held that the vessel was unseaworthy when she originally started on the voyage, and that consequently the underwriters were not liable.[2]

Not only must the state of the hull of the vessel herself comply with the requirements of seaworthiness; she must not be overloaded, and her cargo must be properly stowed. She must also not be undermanned, and her officers and crew must be efficient.

[1] The following clause is sometimes inserted in policies: "Seaworthiness admitted as between Assurer and Assured."

[2] *Quebec Marine Insurance Co.* v. *Commercial Bank of Canada.* (1870) L R., 3 P.C., 234.

Moreover, she must be reasonably fit to carry the cargo to the destination contemplated by the policy :[1] in other words, she must be "cargo-worthy."

In a "voyage" policy on hull, the warranty of seaworthiness applies to the condition of the vessel at the commencement of the adventure. It often happens, however, that the voyage insured may be capable of division into distinct stages, and where that is so, the warranty of seaworthiness must be complied with at the commencement of each separate stage.

Two decisions of our Courts may be usefully referred to as affording illustrations of the foregoing.

The first case is that of *Bouillon* v. *Lupton*.[2] Three steamers which were trading on the River Rhone had been sold for service on the Danube, and were insured for the voyage from Lyons to Galatz. In order that these vessels might pass under the numerous low bridges which span the Rhone, it was necessary that they should leave Lyons without masts, and in this condition they descended the river as far as Marseilles. On arrival at the latter port, they were fitted with masts and generally prepared for the voyage to Galatz. When the vessels entered the Black Sea a storm arose, and they all foundered. The underwriter declined to pay, on the ground that when the vessels left Lyons they were not in a state of seaworthiness for the *whole* voyage. But the Court decided that the warranty had been complied with if different degrees of seaworthiness were necessary for the different stages of the voyage, and if at the commencement of each stage the vessels were properly equipped. And it was held that these requirements had been fulfilled in this case, and that the underwriter was liable. As was

[1] Marine Insurance Act, § 40 (2), p. 176 *infra*.

[2] (1863) 33 L.J. C.P., 37.

observed by Mr. Justice Wills: "In descending the Rhone a vessel must be seaworthy (if I may use the term) for the Rhone; and from Marseilles to Galatz she must be ready for the sea."

In the foregoing case the stages of the voyage in relation to the warranty of seaworthiness required different equipment, one state being sufficient for the river voyage, and another and superior state being necessary for the sea voyage. But it does not follow that each separate stage need necessarily be endowed with a difference of conditions. Now-a-days there are huge vessels carrying thousands of tons of cargo on voyages, for example, to the Antipodes, and it would be an impossibility from a commercial point of view for a vessel to take on board at the commencement of the voyage a sufficient coal supply for the whole voyage. It has therefore become customary to coal at intermediate ports. *Prima facie*, a vessel must be provided, when she sails, with sufficient coal for the whole voyage in order to satisfy the warranty of seaworthiness. But the difficulty arising out of so strict a compliance with the warranty has been solved by two decisions of the Court of Appeal,[1] both cases arising out of contracts of affreightment, *i. e.* disputes between shippers and shipowners, and not in connexion with liabilities under marine insurance policies.[2] These decisions have established the rule that where a steamship starts on a voyage which is of such a length and duration that she can only take on board at the commencement sufficient coal for a section or portion of the

[1] *Thin* v. *Richards*, (1892) VII. Asp. M.L.C. 165; the *Vortigern*, (1899) IV. Com. Cas. 152, VIII. Asp. M.L.C., 523.

[2] As to marine policies also, see *Greenock S.S. Co.* v. *Maritime Insurance Co., Ltd.*, (1903) IX. Com. Cas. 41, IX. Asp. M.L.C., 463.

voyage, and it is the intention to take on board a further supply in place of that consumed at one or more intermediate ports, such voyage must be considered as being divided into stages for coaling purposes, and the warranty of seaworthiness attaches on the sailing of the vessel from each coaling port for the stage which ends at the next coaling port.

Of the two decisions of the Court of Appeal just mentioned, the one to which attention is invited is that of the *Vortigern*, because, although it arose, as has been said, out of a contract of affreightment, the late Lord Justice Smith expressly stated that the decision was equally applicable to contracts of marine insurance.[1] The vessel was on a voyage from Cebu (Philippine Islands) to Liverpool. This voyage was, for coaling purposes, divided into three stages: from Cebu to Colombo; from Colombo to Suez; and from Suez to Liverpool. Owing to the negligence of the engineer, the vessel sailed from Colombo for Suez, which constituted the second stage of her voyage, with an insufficient supply of coal for that stage. The result was that before she reached Suez she ran short of fuel, loss being subsequently incurred by putting cargo into the furnaces as a substitute for coal. It was held by the Court that the vessel was unseaworthy, inasmuch as she had started on the second stage of her voyage (Colombo to Suez) with an insufficient quantity of coal to complete that stage.

In the case of an insurance on goods, there is no implied warranty of seaworthiness so far as the goods themselves are concerned;[2] but an underwriter cannot, in the absence of special stipulation, be held responsible for loss

[1] See also *Greenock S.S. Co.*, v. *Maritime Insurance Co., Ltd.*, (1903) IX. Com. Cas. 41, IX. Asp. M.L.C., 463.

[2] Marine Insurance Act, § 40 (1), p. 176 *infra*.

or damage which has occurred to them owing to their *inherent vice*, or, as it is more generally called, *vice-propre*. For example, the spontaneous heating of copra, *i. e.* dried cocoa-nut.[1]

The implied warranty of seaworthiness which requires such strict fulfilment as regards the ship does not extend to lighters employed to take cargo ashore, where the policy includes "risk of craft to and from the ship."[2]

Legality

The second of the implied warranties is that the adventure shall be a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.[3] No policy is valid if it has been effected with a view to cover a trade or voyage which is prohibited by the law of this country. An insurance to cover the risk of smuggling, for example, which, if detected, would involve the confiscation of the property by our revenue laws, is void. But should the adventure insured be a legal one, and the master and crew, unknown to the owner, indulge in smuggling on their own account, this would not avoid the policy, as it would be a case of barratry.

An insurance against the risk of British capture[4] in time of war would, of course, be illegal.

[1] *Koebel* v. *Saunders*, (1864) 33 L.J.C.P., 310.
[2] *Lane* v. *Nixon*, (1866) L.R., 1 C.P., 412.
[3] Marine Insurance Act, § 41, p. 176 *infra*.
[4] *Vide* p. 18 *infra*.

CHAPTER II

THE POLICY AND ITS PHRASEOLOGY

BEFORE proceeding to consider the phraseology of the policy in detail it may be well to glance at the document as a whole.[1] It is true that it is an antiquated document, and it can hardly be expected, therefore, to find that it exactly fits in with the requirements of the commerce of the present day. The words of the venerable policy-form have been likened to hat-pegs waiting to be capped by legal decisions, a process which in course of time has provided us with very many caps upon the pegs. These legal caps are not to be lightly cast aside, and in considering the advisability of abolishing or amending the venerable form of policy it must not be forgotten that its phraseology and terms have been so subjected to legal decisions, that the meaning which our Courts attach to almost every word has been ascertained. The adoption of a new form of policy would therefore not unlikely provide a fresh row of hat-pegs to await in turn legal decisions to cap them. For this reason it seems preferable to keep to our old friend the ancient form, to

> ". . . rather bear those ill's we have
> Than fly to others that we know not of."

It is true that the antiquated form of policy has to do service for insurances of every kind—Hulls, etc., for time

[1] *Vide* p. xiii. *supra*.

or voyage, Goods, Freight, Profits, and even Bonds perhaps from London to Manchester by registered post, an adaptation, by the way, scornfully referred to by the late Lord Esher, M.R., in the case of *Baring* v. *The Marine Insurance Co.*[1] as an "acrobatic performance." If its terms do not exactly express the requirements of the parties, this fault is remedied by writing in conditions, or by sticking on clauses to give effect to their wishes. Some Companies have now adopted a separate form of policy for use in the insurance of hulls of vessels as opposed to goods, and it seems not improbable that this will sooner or later meet with general adoption.

At one time it was doubted whether a marine policy would cover land risks while the property insured was on land, or whether it was only applicable to property whilst it was afloat; but it has been decided "that when either by a known or by an agreed usage, or by the terms of the policy, land is made part of the voyage, the risk covered applies to that part as well as the other."[2]

A policy, in order to be valid, must be duly stamped. For "voyage" policies the duty is now 1*d.* for each £100 assured, or fractional part thereof. Where, however, the premium charged is 2*s.* 6*d.* per centum or less, the duty is 1*d.* only, for both "voyage" and "time" policies, without regard to the amount insured.[3] For a "time" policy for a period not exceeding six months the duty is 3*d.* for each £100 assured, or fractional part thereof. For a "time" policy for a period exceeding six months but not exceeding twelve months, the duty is 6*d.* for each £100 assured or fractional part thereof. If the

[1] (1894) 10 T.L.R., 276.

[2] *Rodocanachi* v. *Elliot*, (1874) II. Asp. M.L.C., 21, 399.

[3] As to stamp required for "Continuation Clause" see p. 153 *infra.*

policy on hull, etc., is for a voyage and for a period of only thirty days after arrival at destination, it is chargeable only with duty as a voyage policy. But if the period exceeds thirty days, the policy must be stamped with double duty—as a policy for voyage and a policy for time. Consequently, if thirty days are covered in addition to the "twenty-four hours" mentioned in the policy, this, being a period of thirty-one days, would, as above indicated, involve double duty.[1] It is, therefore, usual to delete the words "twenty-four hours" if the vessel be also covered for thirty days after arrival.

A "construction" policy is, for stamping purposes, regarded as a "voyage" policy, and, though it may cover a period exceeding twelve months, is not deemed to be a "time" policy.[2]

No "time" policy may be effected for a period exceeding twelve months, and any policy so made is null and void.

Policies issued abroad and made payable in the United Kingdom are by law required to have a Government stamp for duty affixed to them within ten days after their first receipt in the United Kingdom.

Construction

The question naturally arises, What rules of construction are to be applied to the policy? An answer to that question may be found in the words of Lord Ellenborough:[3] "The same rule of construction which applies to other instruments applies equally to this, namely, that it is to be construed according to the sense and meaning as collected, in the first place, from the terms used in it, which

[1] Allen's *Stamp Duties on Sea Insurance*, II. Ed. p. 102.

[2] The Revenue Act, 1903. 3 Edw. VII. C. 46, § 8.

[3] *Robertson* v. *French*, (1803) 4 East, 130.

terms are to be understood in their *plain, ordinary, and popular sense* unless they have generally in respect to the subject-matter, as by known usage of trade or the like acquired a peculiar sense, distinct from the popular sense of the same words, or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties, be understood in some other special and peculiar sense."

In the event of there being any reasonable doubt as to the construction of the policy, evidence may be given as to any existing usage or custom which may throw light on the real intention of the parties to the contract. But evidence of custom or usage can only be admitted when the meaning of the contract is doubtful. In the words of Lord Lyndhurst: "Usage is only admissible to explain what is doubtful, never to contradict what is plain."[1]

In the event of there being any reasonable doubt as to the construction of the policy, it must be construed against the grantor of the contract—the underwriter—that being the rule of English law applying to written contracts generally. It must also be borne in mind that anything written on the face of the policy, or any printed clause attached thereto, overrides any printed matter to which such writing may be opposed.[2]

Assignment

The policy is a document which is capable of assignment by the person in whose name the insurance has been effected to another person who may be interested therein, the assignment usually being merely by means

[1] *Blackett* v. *Royal Exchange Assurance Corporation*, (1832) 3 C. & J., 244.

[2] For Rules for Construction of Policy see First Schedule to Marine Insurance Act, p. 199 *infra*.

of endorsement and delivery.[1] In the event of a vessel being sold, an insurance on her hull, etc., effected by the vendor ceases to cover her unless the policy is transferred as part of the sale transaction. And similarly in the case of a transfer to new management. The following clause is, however, usually inserted in policies on hull, etc., viz.—

> "Should the vessel be sold or transferred to new management, then, unless the underwriters agree in writing to such sale or transfer, this policy shall thereupon become cancelled from date of sale or transfer, unless the vessel has cargo on board and has already sailed from her loading port or is at sea in ballast, in either of which cases such cancellation shall be suspended until arrival at final ports of discharge if with cargo, or at port of destination if in ballast. A *pro rata* daily return of premium shall be made."

A question as to the meaning of the words "transferred to new management" came before the Courts in the case of *Pyman* v. *Marten*.[2] The steamer *Easby Abbey*, insured under a time policy, was captured by the Japanese during their war with Russia, and was condemned by a Prize Court. It was held by the Court of Appeal, affirming the decision of Phillimore J., that this was not a transfer to new management within the meaning of the clause, and that therefore no *pro rata* return of premium was recoverable.

THE PHRASEOLOGY OF THE POLICY

Having considered the contract of marine insurance as a whole, and the implied warranties with which com-

[1] See Marine Insurance Act, §§ 50 and 51, p. 179 *infra*.
[2] (1907) XIII. Com. Cas., 64.

pliance is necessary, the contract may now be examined in detail.

The opening words of the policy are—

Be it known that . . . . .

after which is a space for the name of the person who is either the actual assured or his agent. The insertion of some name in this space is absolutely necessary,[1] and the name which is filled in must be that of the assured or of some person who effects the insurance on his behalf. And this leads to the initial question

Who may Insure? Insurable Interest

The person who effects an insurance, or gives instructions for it to be effected, must have what is termed an "Insurable Interest." He must "be so situated with regard to the thing insured that he would have benefit from its existence, prejudice by its destruction."[2] The Marine Insurance Act provides that "a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure, or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof."[3]

It must not be inferred that it is only the owner of property, either entirely or in part, who has a right to insure. Shippers, agents and so forth have an insurable interest in property in respect of which they are in a position to exercise a valid lien for money advanced; a mortgagee of a vessel has an insurable interest to the

[1] Marine Insurance Act, § 23, p. 170 *infra*.

[2] Lawrence J. in *Lucena* v. *Crawfurd*, (1806) 1 Taunt, 325.

[3] § 5 (2) p. 165 *infra*.

extent of his mortgage; a trustee or bailee as regards property entrusted to his care; agents or brokers having authority from their principals to insure; and, it need hardly be added, an underwriter in respect of risks which have been underwritten by him and which he may himself wish to re-insure.

All persons irrespective of nationality have the right by English law to protect their property by English insurance, with one exception, viz.—alien enemies, *i. e.* subjects of a foreign state at war with this country, the reason being that it would be impolitic to allow subjects of the Crown to indemnify an enemy for losses inflicted on his commerce.

> "*As well as in his or their own name as for and in the name and names of all and every other person or persons to whom the same doth, may or shall appertain, in part or in all, doth make assurance and cause himself or themselves and them and every of them to be insured.*"

This wording provides not only for assignment of the policy,[1] but also enables any person who, during the currency of the risk, may have, or may acquire, an insurable interest in either a part or in the whole of the subject-matter of the insurance, to avail himself of the protection of the policy by subsequent adoption, although the policy is made out in the name of some other person. Moreover, it is not necessary that the adoption of the policy should be made before the happening of the loss. For example, a London insurance broker effected, by the instructions of one Hagedorn, an insurance for the benefit of a foreign merchant named Schroeder. The latter, however, had given Hagedorn no instructions to

[1] *Vide* p. 15 *supra*.

insure. A loss occurred, and some two years after its happening the foreign merchant, Schrœder, wrote to Hagedorn "hoping" that the loss had been paid by the underwriters on the policy in question. This adoption by Schrœder was held to be equivalent to a previous authority to insure.[1] The case is an old and an extreme one, and the business methods of to-day hardly enable us to realise a merchant complacently waiting two years before taking any measures to ascertain what was his position with regard to recovering the loss. But it serves well as an illustration.

The Marine Insurance Act provides[2] that where a contract of marine insurance is in good faith effected by one person on behalf of another, the person on whose behalf it is effected may ratify the contract even after he is aware of a loss.

"*Lost or not lost.*"

The meaning of these words is plain, but their effect is not so wide as it may seem at first sight. Their effect, though limited, is certainly retrospective, but their applicability to the contract is subject to certain conditions when the insurance was effected. A merchant may often have his goods exposed to the dangers of the seas before he has news of their shipment, or an opportunity of protecting them by insurance. And it is by the introduction of the above words, and their retrospective effect, that such a contingency is provided for. Of course the person effecting the insurance must be without any information that a loss had occurred. If he did know of the happening of a loss and the underwriter did not, it would be a concealment and a breach of good

[1] *Hagedorn* v. *Oliverson*, (1874) 2 M. and S., 485.

[2] § 86, p. 195 *infra*.

faith which, as already observed, would render the insurance void. Or, conversely, if the merchant effected an insurance when the underwriter knew that the vessel had safely arrived, though the merchant was ignorant of the fact, the underwriter would in such a case have to return the premium, or an action at law would succeed against him if he did not do so. These remarks do not, of course, apply to declarations under "open" or "floating" policies. Where, however, in the case of an ordinary policy, neither underwriter nor assured has knowledge of a loss having happened, the assured will be entitled to recover for a loss which had actually happened before the contract was entered into. And this is the limit of the retrospective meaning to be attached to the words "lost or not lost."

"*At and from.*"

These words precede the blank space left for the insertion of a description of the voyage insured, and it must be noted that there is a very material distinction to be drawn between an insurance "*from*" and an insurance "*at and from*" a port. A policy covering the risk "from" a port only protects the subject-matter of the insurance from the time of sailing from the port. For example, an insurance "from" London to New York only attaches from the moment when the vessel sails from London on her voyage. But an insurance "at and from" a port has a far wider meaning. It protects the subject-matter of the insurance whilst *at* the port of departure previous to the vessel's sailing, and also from the time of leaving it, and on her voyage.

If a vessel at her home port is insured "at and from" that port, the insurance attaches immediately it

is effected, and continues to protect her whilst she is making the necessary preparations for the voyage.[1]

If a vessel be insured "at and from" a port which she has not then reached, the insurance commences immediately on the vessel's arrival at that port, always provided, however, that she shall have arrived there in such a condition that she can reasonably be regarded as in a state of good physical safety. Should the vessel arrive at the port so seriously damaged that she cannot lie there in safety until repaired, the policy does not attach. It does not follow that she must have arrived at the port undamaged; but if the damage is only of such a nature as not in any way to interfere with her safety whilst in port, then the policy attaches from the moment of her entering within the limits of the port.

An important case bearing on the meaning of the words "at and from" a port abroad is that of *Haughton* v. *The Empire Marine Insurance Co.*[2] An insurance was effected on the hull of a vessel "at and from" Havana to Greenock. The vessel arrived off Havana, and on entering the limits of the port engaged a pilot and tug to take her to an anchorage. She was, however, taken to an anchorage where she subsequently settled down upon the anchor of another vessel, doing serious injury to herself. On the following day she was towed off and taken to another part of the harbour where her cargo was eventually discharged. The underwriters of the policy "at and from" Havana declined to pay for the repair of the damage occasioned by the settling down upon the anchor, contending that when the accident happened the vessel was not *at* Havana within the meaning of the wording of the policy, because, they alleged, she had never been

[1] *Palmer* v. *Marshall*, (1831) 8 Bing., 79.
[2] (1866) L.R. 1 Ex., 206.

safely moored at her port of arrival. But the Court held otherwise, deciding that the vessel was *at* Havana in the ordinary sense, that the policy had attached, and that the underwriters were therefore liable.

It often and, indeed, generally happens that when a vessel arrives at a port abroad she is covered by a policy for the outward voyage, including, as will presently be seen, a period varying from twenty-four hours to thirty days after her arrival there. It therefore follows that a vessel on arriving at her port is not infrequently covered for a certain period by both the outward policy and by the homeward policy "at and from." To obviate this duplication or overlapping of insurances it is usual to insert in the last-mentioned policy a clause to the following effect, viz.—

> "The risk is not to commence before the expiry of previous policies."

If the insurance be "at and from" a country, such as Brazil, or a district comprised therein, or an island, say Jamaica, which comprises several ports, the insurance on the hull, etc., of a vessel commences immediately upon the arrival in good safety at any one of the ports in such district or island, and the insurance on the cargo immediately on its being shipped at any one of such ports.[1]

The Voyage

The blank space following the foregoing words "*at and from*" is for the insertion of the voyage or for the period of time which the insurance covers. With respect to the voyage, it is of paramount importance that it should be accurately described. It is always assumed by the underwriter that the ordinary course or track of

[1] Cf. *Maritime Insurance Co.* v. *Alianza Insurance Co. of Santander*, (1907) XIII. Com. Cas., 46.

the voyage contemplated is to be pursued, and if in any special instance it is intended that the usual route shall be departed from, this fact must be communicated to him, such intended departure being usually incorporated in the description of the voyage. In the absence of any such provision it is an implied condition of the contract that there shall be no deviation.

Deviation

Deviation and its consequences are provided for in the Marine Insurance Act as follows, viz.—

46.—(1) Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs.

(2) There is a deviation from the voyage contemplated by the policy—

(*a*) Where the course of the voyage is specifically designated by the policy, and that course is departed from; or

(*b*) Where the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from.

(3) The intention to deviate is immaterial; there must be a deviation in fact to discharge the insurer from his liability under the contract.

47.—(1) Where several ports of discharge are specified by the policy, the ship may proceed to all or any of them, but, in the absence of any usage or sufficient cause to the contrary, she must proceed to them, or such of them as she goes to, in the order designated by the policy. If she does not there is a deviation.

(2) Where the policy is to "ports of discharge," within a given area, which are not named, the ship must, in the absence of any usage or sufficient cause to the contrary, proceed to them, or such of them as she goes to, in their geographical order. If she does not there is a deviation.

48.—In the case of a voyage policy, the adventure insured must be prosecuted throughout its course with reasonable dispatch, and, if without lawful excuse it is not so prosecuted, the insurer is discharged from liability as from the time when the delay became unreasonable.[1]

With regard to voluntary delay, it does not matter whether the risk has or has not been thereby increased. The only question is whether the risk has been varied. As an extreme example of delay which would void an insurance may be instanced the case of a vessel being insured for a voyage across the Atlantic, the time when the insurance was effected being, say, June, leading the underwriter to think that a summer voyage was intended. In the event of there being such unreasonable delay in commencing the voyage that it was postponed until winter, such delay would, needless to say, avoid the policy.[2]

There may have been, however, a deviation which is justifiable, in which case the insurance stands good. It is necessary, therefore, to explain the circumstances, or, rather, the essential conditions which must be present in order to justify a deviation, and in order to do so the Marine Insurance Act may be quoted so far as regards justifications for deviation. These justifications are seven in number.

[1] Marine Insurance Act, §§ 46–48, p. 177 *infra*.

[2] Cf. *Maritime Insurance Co.* v. *Stearns*, (1901) VI. Com. Cas., 182.

Section 49 (p. 178 *infra*) of the Act provides—

> Deviation or delay in prosecuting the voyage contemplated by the policy is excused—
>
> i. Where authorised by any special term in the policy.

The proposition contained in this provision is self-evident, as it naturally follows that if deviation is "*authorised*" by the terms of the policy, a deviation would not render it void. It may here be mentioned that such authorisation or permission to deviate is ordinarily incorporated into the policy by the attachment of a clause called the

Deviation and/or Change of Voyage Clause

This clause assumes a variety of forms, the simplest of which is perhaps the following, viz.—

> "In the event of deviation and/or change of voyage, the assured to be held covered at a premium to be arranged, provided due notice be given on receipt of advices."

By the insertion of this clause explicit permission is given to deviate or to change the destination of the vessel. It must be shown, however, that the vessel actually sailed on the voyage covered by the policy, otherwise the terms of the clause do not apply. If the vessel sailed on a voyage different from that insured, the policy would not attach, and if the contract itself did not attach, a clause forming part of the contract could not have any effect. This proposition is based on the case of *Simon Israel and Co.* v. *Sedgwick*,[1] a decision of the Court of Appeal in 1892. The policy was stated to be "at and from the Mersey and/or London, both or either, to any port or ports in Portugal, and/or Spain

[1] (1892) VII. Asp. M.L.C. 245.

this side of Gibraltar, and/or at and from thence by any inland conveyances to any place or places in the interior." It also included a clause providing that deviation or change of voyage should be held covered at a premium to be arranged. Goods, the property of the assured, were dispatched from Bradford and destined to Madrid, and the intention was that the said goods should be shipped at Liverpool for Seville, to be thence forwarded by land to Madrid. This was the route, or rather method of forwarding goods to Madrid, which had been uniformly followed in previous cases by the shippers, and they accordingly instructed their insurance brokers that the voyage was to Seville, and the insurance was put forward accordingly. The goods were shipped by the *Lope de Vega*, and it became apparent on an inspection of the bills of lading that the voyage on which the vessel had sailed was not to Seville at all, but to Carthagena, a port on the east coast of Spain, whence the goods could likewise be sent forward to Madrid by rail. The vessel was lost, the loss happening on that part of the voyage which was common to vessels going either to the western or eastern ports of Spain. The shippers, in view of the clause in the policy providing that deviation and/or change of voyage should be held covered at a premium to be arranged, offered to pay an additional premium to cover the goods to Carthagena, but this the underwriters refused to accept. The shippers thereupon sued the underwriters to recover the loss. The Court, however, decided against them, holding that there had not been a mere intention to deviate, but that inasmuch as the vessel actually sailed on a different voyage, and one which was not covered by the policy, the policy had never attached, and that, therefore, the "deviation and/or change of voyage" clause contained in the policy could

have no force or effect. In other words, as the contract itself did not apply, *a fortiori* none of the terms of it could apply.

The second justification given for deviation is—

ii. Where it has been caused by circumstances beyond the control of the master and his employer.

Deviation caused by the violence of the elements is, of course, excusable, as in the case of a vessel blown out of her course by violent gales.[1] But there may be instances of deviation caused by circumstances beyond the control of the master and his employers which are not attributable to the action of the elements. For instance, a crew, fearing the attacks of pirates if they continued on the voyage, all left the ship and refused to go back unless the master promised to forthwith return to his home port. The captain promised and returned, and his so returning was in these circumstances held to be no deviation.[2]

The third excuse is—

iii. Where the deviation is reasonably necessary in order to comply with an express or implied warranty.

The case of *Bouillon* v. *Lupton*[3] referred to in connexion with the implied warranty of "seaworthiness,"[4] provides an illustration of the purport of this justification. The case will doubtless be remembered—the steamers coming down the River Rhone without masts on account of the bridges, fitting out at Marseilles for the sea, and being subsequently lost. The delay at Marseilles in order to make these vessels seaworthy constituted a deviation, but it was a deviation which was justifiable.

The fourth justification is—

[1] *Delaney* v. *Stoddart*, (1785) I. T.R., 22.
[2] *Driscol* v. *Bovil*, (1798) 1 B. & P. 313.
[3] (1863) 33, L.J.C.P., 37.
[4] *Vide* p. 8 *supra*.

iv. Where the deviation is reasonably necessary for the safety of the ship or subject-matter insured.

This excuse seems hardly to need any explanation. It simply provides that where, having regard to the risks covered by the policy, the deviation is necessary for the safety of the thing insured, it is justifiable. A vessel, for example, may meet with violent weather and be so damaged as to necessitate putting into a port of refuge for repair. Deviation for such a purpose is justifiable. Or a vessel, properly equipped and manned at the commencement of the voyage, may run short of provisions, or a large proportion of her officers or crew may have become incapacitated or died from sickness or other causes; and putting into port to obtain further provisions or to procure fresh officers or hands is excusable.

The fifth and sixth exceptions which justify deviation are—

v. When the deviation is made for the purpose of saving human life or aiding a ship in distress where human life may be in danger.

vi. Where it is reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship.

These exceptions are justified on the grounds of humanity, and it would be strange indeed if a deviation were not allowable for such purposes. But it must be carefully noted that the liberty to deviate under the fifth exception is only for the purpose of saving life, and does not extend to cover a departure from the voyage in order solely to save property. If a salvage service rendered to a ship and cargo is of such a nature as not to be reasonably necessary for the saving of the lives of those on board, the deviation is unjustifiable.[1]

[1] *Scaramanga* v. *Stamp*, (1880) IV. Asp. M.L.C., 295.

The seventh and last exception is—

> vii. Where the deviation has been caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against.

The meaning of "barratry" will be dealt with when considering this term in the policy. Suffice it to say, for present purposes, that "barratry" is any wrongful act wilfully committed by the master or crew of a vessel in violation of their duty to the shipowner, and without his connivance. And if deviation is due to such an act, then it is excused.

Finally, there is the proviso—

> When the cause excusing the deviation or delay ceases to operate, the ship must resume her course, or prosecute her voyage, with reasonable dispatch.

In other words, after a justifiable deviation there must be no waste of time in resuming the voyage, otherwise deviation again occurs, annulling the contract.

"Time" Policies

With regard to insurances for periods of time, the exact date and hour of the commencement and termination should always be inserted in the policy. But if there is no stipulation as to the hour of the particular day on which the insurance is to commence, then the day is deemed to begin from and end at midnight.

It must be further noted that the contract is governed by civil time and not by nautical time, and by English, *i. e.* Greenwich mean time, and not the time of the place where the vessel may happen to be.

"*Including risk of craft to and from the vessel.*"

These words do not appear on the ordinary Lloyd's form of policy though always in a "Company" policy, but

they are usually included in Lloyd's form of policy on goods by means of a clause, the terms of which vary. The incorporation of these words in the policy, or their introduction by means of a clause, is rendered necessary by the fact that, in the absence of such special wording, the risk of craft whilst loading is not covered by the ordinary wording of the policy, the risk on goods commencing, as will presently be seen, "from the loading thereof on board the said ship." Risk of craft at the port of discharge, if craft are ordinarily and usually employed, is covered by the policy without special proviso, as it protects the goods, as will also presently be seen, until they are "discharged and safely landed."

It must be noted, however, that in discharging, the usual and customary methods of trade must not be departed from. For example, a merchant is not justified in taking delivery of his goods at a place or time materially different from that which prevails as the ordinary custom of the port. Similarly, the lighterage contemplated under the policy is the ordinary extent of lighterage, and would not include a lighterage, for a merchant's special purposes, of, say, several miles when, in the ordinary course, it would be trifling.

If any special contract with the lighterman is entered into whereby the ordinary terms of lighterage are so varied as to constitute a material fact, this must be communicated to the underwriter when the risk is effected, otherwise the insurance will be void on the ground of concealment. An important case in this connexion is that of *Tate* v. *Hyslop*.[1] In that case the policy included the risk of craft to and from the vessel. Whilst discharging, a loss in craft occurred. It transpired that the contract between the assured and

[1] (1885) V. Asp. M.L.C., p. 487.

the lighterman contained a provision that, in the event of loss, there should be no recourse against the latter, in consideration of which exemption the lighterage contract was obtained at a reduced rate. As the existence of this stipulation was not disclosed to the underwriter—a stipulation which, on his paying the loss, would deprive him of any right of recovery from the lighterman in the name of the assured—it was held to be the concealment of a material fact which vitiated the policy.

Another point is that the lighterage must actually be the termination of the voyage insured, and not the beginning of a new voyage, as, for example, taking the goods for transhipment to an export vessel, in which case the delivery into lighter is a constructive delivery to the assured and terminates the insurance, thereby rendering any subsequent loss in craft not recoverable.[1]

> "*Upon any kind of goods and merchandise, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture of and in the good ship or vessel called the . . .*"

This antiquated wording was framed when the ship and the goods she was carrying generally belonged to one and the same person. In order to meet modern requirements it is now usual to insert in the space provided in the policy for the valuation (*vide* p. 36) a description of the subject-matter of the insurance. As previously mentioned, such written details control, or, maybe, override the printed wording of the contract.

Name of Vessel

The name of the vessel should be inserted in the policy in the space provided for that purpose. When

[1] *Houlder* v. *Merchants' Marine Insurance Co.*, (1886) L.R., 7 Q.B.D., 354. VI. Asp. M.L.C. 12.

once an insurance on cargo has been effected, the vessel cannot be changed unless with the consent of the underwriter, although the vessel so substituted may perhaps be even superior to the original one. But if the original vessel meets with disaster during the voyage, and is so disabled as to necessitate the transhipment of the cargo to another vessel for safety or for conveyance to destination, the insurance covers the goods whilst on the transhipping vessel, and if she should be lost, the loss of the goods would be recoverable under the policy.

> "*Whereof is Master for this present voyage . . . or whosoever else shall go for master in the said ship.*"

Here is a space for the insertion of the name of the master of the vessel, but this space is not often filled in.

The wording provides that if, whether by accident, illness or otherwise, the master originally named should be prevented from taking command, then a substitute may be appointed. But the words "or whosoever else shall go for master," would not justify, for example, an assured representing to the underwriter that a well-known and experienced master would have command of a vessel in order to get him to favourably regard the risk, knowing all the time that it was never intended for that master to sail in the vessel.

> "*Or by whatsoever other name or names the said ship or the master thereof is or shall be named or called.*"

These words provide for cases where a mistake or inaccuracy has occurred in the spelling or otherwise of the name of the vessel or master. Such mistakes have no effect on the validity of the contract provided the underwriter has not been misled by them; but if the underwriter should have been misled, however innocently and without fraud, the insurance is void.

Commencement of Risk on Ship

This has already been fully dealt with in discussing the distinction between an insurance "*from*" and "*at and from*" a port. (*Vide* p. 20 *supra.*)

Commencement of Risk on Goods (and Freight)

> "*Beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship.*"

In the absence of any special clause, therefore, the risk on Goods (and Freight) commences immediately, and not until, the goods are on board the vessel. It has already been noticed, however, that it has become usual to insert the words "including risk of craft to and from the vessel" (in fact, these words are printed in "Company" policies), and the meaning and effect of this clause has been considered.

Termination of Risk on Ship

> "*Upon the said ship, etc., until she hath moored at anchor twenty-four hours in good safety.*"

As regards an insurance on Hull,etc.,for voyage, after the vessel has arrived at her port of destination, the insurance continues to protect her "until she hath moored at anchor twenty-four hours in good safety." In the case of a vessel with cargo on board, it is not only necessary that she should have arrived *at* the port, but she must have been moored at the usual place for the discharge of cargo before the twenty-four hours will commence to run. Sometimes it is agreed in voyage policies on hull, etc., to cover the vessel for thirty days after arrival, *i. e.* thirty consecutive periods of twenty-four hours commencing from the precise time of the day at which the vessel arrived and was moored

in safety,[1] and in the absence of some stipulation to the contrary, such an addition would cover the vessel for thirty days after the expiry of the twenty-four hours.[2] In covering a vessel for thirty days after arrival, however, it is usual to delete the words "twenty-four hours,"[3] for the reason already mentioned with reference to stamp duty. (*Vide* p. 14 *supra.*)

The most important point with regard to this phrase is to ascertain the meaning of "good safety." These words cannot imply absolute and complete safety, otherwise the happening of a trifling accident would prevent the vessel being considered to have arrived in good safety. On the other hand, she must not be in a sinking condition and artificially kept afloat for the twenty-four hours.[4] The vessel must be, however, in good physical safety, *i.e.* in such a condition as will enable her to safely discharge her inward cargo and to generally perform the business ordinarily expected of a vessel at her port of destination.

In this connexion the celebrated case of *Lidgett* v. *Secretan*[5] may be referred to. The vessel *Charlemagne* was insured from London to Calcutta and for thirty days after arrival. On entering the River Hooghly, she struck a bank, damaging her steering gear: her after compartment filled with water and necessitated constant pumping to keep her afloat. In this condition she arrived at Calcutta on 28th October, was duly moored and discharged her cargo. On 12th November she was taken to

[1] *Cornfoot* v. *Royal Exchange Assurance*, (1903) IX. Com. Cas., 80. IX Asp. M.L.C., 489.

[2] *Mercantile Marine Insurance Company* v. *Titherington*, (1864), 11. L.T.M.S., 340.

[3] Cf. *Cornfoot* v. *Royal Exchange Assurance*, (1903) IX. Com. Cas., 80. IX. Asp. M.L.C., 489.

[4] *Shaw* v. *Felton*, (1881) 2 East, 109.

[5] (1870) I. Asp. M.L.C., 95.

a dry dock for repairs, and whilst there she was, on 5th December, destroyed by fire. The fire occurred twenty-three days after the vessel had been placed in dock, and thirty-eight days after she had moored at Calcutta. The question to be determined was whether the thirty days in the outward policy had terminated prior to the loss. The Court decided that the policy had terminated, inasmuch as the vessel, though disabled, had been kept afloat by the exertions of the captain, had moored at the usual place for discharging cargo, had discharged her cargo, and had remained in possession and control of her owners until the expiration of the thirty days.

The risk under a "port" policy would ordinarily terminate at the date specified for expiry. If, however, previous to the date specified, the vessel, being fully equipped and ready for sea, commences to navigate upon a voyage, the port policy immediately ceases to attach. The commencement of a voyage, as distinguished from the termination of a lying in port, is determined by what purports to be done at the time of the act of quitting the actual mooring—whether or not there was any intention for the vessel to return to that mooring. If the vessel cast off from her mooring with the *intention* of proceeding on a voyage, that would terminate the "port" risk, although the vessel might still be actually within the port.[1]

Termination of Risk on Goods (and Freight)

"And upon the goods and merchandises until the same be there discharged and safely landed."

The moment of termination of the risk on Goods (and Freight) is, therefore, in the absence of any other stipu-

[1] *Mersey Mutual Underwriting Assurance, Ltd.* v. *Poland*, (1910) XV. Com. Cas., 205. *Vide* also *Hunting* v. *Boulton*, (1895) I. Com. Cas., 120. Cf. *Sea Insurance Co.* v. *Blogg*, (1898) III. Com. Cas., 218, p. 129 *infra*.

lation, that of the goods being "safely landed." If, by the custom of the trade, the landing of the goods is performed by means of lighters or other craft, the insurance, as already mentioned, covers them while they are in such craft.

Touch and Stay

> "*And it shall be lawful for the said ship, etc., in this voyage to proceed and sail to and touch and stay at any ports or places whatsoever without prejudice to this insurance.*"

This liberty, however, widely as it reads, is not without limitation and is not to be regarded as a permission for deviation.[1] The ports called at must be in the ordinary course of the voyage insured, and further, the calling must be for some justifiable purpose in connexion with the adventure. This has, however, already been fully dealt with in relation to the voyage insured. (*Vide* p. 25 *et seq.*, *supra.*)

Valuation

> "*The said ship, etc., goods and merchandises, etc., for so much as concerns the assured, by agreement between the assured and assurers, are and shall be valued at . . .*"

The space which here follows is for the insertion of the valuation, and where the value, as between the assured and underwriter, has been agreed upon, it cannot be re-opened, unless it be fraudulent or a case of clearly proved *bona fide* mistake.

As has already been observed, it is usual to insert in this space also a description of the subject-matter of the insurance, whether it be Hull, etc., Goods, Freight, Bullion, Profits or Commissions, etc.

[1] Marine Insurance Act, First Schedule, § 6, p. 201 *infra.*

A policy, other than an "open" or "floating" policy, without a valuation is, comparatively speaking, seldom met with now-a-days. The usual wording adopted in policies is—

On (Goods, or Hull, etc.) so valued: or valued at £——.

In the absence of any such words the value is deemed "open," and subject to proof, on the lines laid down by legal decision, and as expressed in § 16 of the Marine Insurance Act.[1] The section reads as follows, viz. :—

"Subject to any express provision or valuation in the policy, the insurable value of the subject-matter insured must be ascertained as follows—

i. In insurance on ship, the insurable value is the value, at the commencement of the risk, of the ship, including her outfit, provisions and stores for the officers and crew, money advanced for seamen's wages, and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, plus the charges of insurance upon the whole.

The insurable value in the case of a steamship, includes also the machinery, boilers, and coal and engine stores if owned by the assured, and, in the case of a ship engaged in special trade, the ordinary fittings requisite for that trade.

ii. In insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at risk of the assured, plus the charges of insurance.

iii. In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to

[1] P. 167 *infra*.

shipping and the charges of insurance upon the whole.

iv. In insurance on any other subject-matter, the insurable value is the amount at the risk of the assured when the policy attaches, plus the charges of insurance."

An example of an unvalued policy is an insurance say for £1,000 on 100 bales cotton—no mention of the total value of the 100 bales being made.

It is most important to remember that in the case of total loss of goods, if the policy be unvalued, no "profit" (the usual 10%, 15%, or whatever merchants usually anticipate and accordingly insure) is to be taken into account in ascertaining the insurable value of the interest.

Perils

"*Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage, they are of . . .*"

Here follows an enumeration of the risks which the underwriter agrees to take upon himself. The losses in respect of them subdivide themselves into two classes—

i. Total loss. ii. Average.

These classes form the subject of subsequent consideration, and an examination of the "perils" enumerated in the policy can therefore now be proceeded with.

First of all there appears

"*Perils of the seas.*"

As a definition of what this term implies, the words of Lord Herschell in the case of the *Xantho*[1] may usefully be quoted. "I think it clear," his Lordship said

[1] (1887) VI. Asp. M.L.C., 207.

"that the term 'perils of the sea' does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen." [1]

"*Fire*"

is the next peril which is mentioned, and the underwriter is liable for the loss or damage occasioned by it, provided, however, that the fire has not been brought about by any cause for which the assured is deemed to be responsible.

So far as a policy on Freight is concerned, it is not necessary that there should have been actual combustion to entitle the assured to recover as for a loss from fire. It will be sufficient if there is an existing state of *peril* of fire—not merely a fear of fire. This was decided in the case of the *Knight of St. Michael*,[2] where a cargo of coal was so heated as to necessitate its discharge and sale of a portion of it at a port of refuge. The defendant underwriters did not rely as a defence on the dangerous condition of cargo when shipped. Mr. Justice Barnes decided that the freight on the coal so sold was recoverable under a policy on freight, the loss, though not a loss by fire, being a loss *ejusdem generis*, and coming within the

[1] *Vide* also *Sassoon* v. *Western Assurance Co.*, Shipping Gazette 29/5/12.
[2] (1897) VIII. Asp. M.L.C , 360, III. Com. Cas., 6.

general words "all other perils losses and misfortunes."[1] In the course of his judgment Mr. Justice Barnes said: "Cases were cited to show that a loss caused by steps taken in consequence of fear of peril, and not to avert an existing peril, is not covered by an ordinary marine policy. It was not disputed that if fire had in any degree actually broken out, and the loss in question had happened to avert its consequences, the plaintiffs could recover directly from the defendants. Now, I have found that fire did not actually break out, but it is reasonably certain that it would have broken out, and the condition of things was such that there was an existing state of peril by fire, and not merely a fear of fire. The case is peculiar, and not analogous to that of any other peril. The danger was present, and, if nothing were done, spontaneous combustion and fire would follow in natural course."

"Men of war, enemies."

These words include all damage or loss sustained owing to the hostile acts of an enemy. But the more common result of hostile operations on the seas is Capture. It may here be again mentioned that an English policy covering the risk of capture of enemy's property by British war vessels is void.

"Pirates, rovers."

These words cover losses caused by marauders plundering indiscriminately for their own personal ends, in contradistinction to persons authorised by Governments or States.[2]

The term Pirates does not, however, only apply to

[1] *Vide* p. 43 *infra.*

[2] *Republic of Bolivia* v. *Indemnity Mutual Marine Assurance Co., Ltd.*, (1909) XXV. T.L.R., 254.

depredators on the seas. It also includes passengers who mutiny, and rioters who attack the ship from the shore.[1] For example, it has been held to apply to an Irish meal mob who, in the time of famine, took possession of a vessel with a cargo of corn which happened to be off the coast, ran her on to the rocks and compelled the master to sell the corn at a low price.[2]

The word "Rovers" is apparently another term for pirates.

"Thieves."

The policy only covers loss by theft when the theft is a forcible or violent robbery (*latrocinium*) and it does not, in the absence of special provision, cover loss by clandestine theft (*furtum*) or pilferage committed by any one of the ship's company, whether crew or passengers.[3]

"Jettisons."

Losses by jettison are recoverable under the policy. Jettison is the throwing overboard of cargo, or the cutting and casting away of masts, spars, rigging, or sails for the purpose of lightening or relieving the ship in case of peril.

Goods which have been jettisoned still remain the property of their owners; and if they should be salved or picked up or otherwise recovered, the owners can claim them on payment of the salvage charges attaching to them.

But no jettison of cargo owing to its inherent vice is covered by the policy. For example, the jettison of fruit which has become rotten owing to a protracted voyage,

[1] Marine Insurance Act, Schedule I., § 8, p. 201 *infra*.
[2] *Nesbitt* v. *Lushington*, (1792) 4 T.R., 783.
[3] Marine Insurance Act, Schedule I., § 9, p. 201 *infra*.

or of hemp shipped in an improper condition which has in consequence become dangerously heated. Nor is a loss by jettison recoverable if the things jettisoned have been improperly carried in an insecure place. For example, one of the customs of Lloyd's provides that: "Water casks or tanks carried on a ship's deck are not paid for by underwriters; nor are warps or other articles when improperly carried on deck."

Of course if the policy provides for the carriage of goods on deck, or if, from the nature of the cargo (*e. g.* carboys of acids), it is apparent that the only fit place for its stowage is on deck, the loss by jettison of it will be recoverable,[1] unless excluded by special warranty to the contrary.

"*Letters of mart and countermart.*"

Letters of Mart, or "Marque," were commissions granted by a Sovereign or Government whereby the holders were empowered to make reprisals on an enemy's shipping in respect of losses which the enemy had inflicted on them. Letters of Countermart were, if they may be so termed, counterblasts to Letters of Mart, authorising resistance to holders of Letters of Mart and also reprisals.

"*Surprisals and takings at sea.*"

These words require no explanation, being apparently merely another way of expressing "*Capture.*"

"*Arrests, Restraints and Detainments of all Kings, Princes and People of what nation, condition or quality soever.*"

These words refer to political or executive acts, and do not cover a loss caused by riot or by ordinary judicial pro-

[1] Cf. *Apollinaris Co.* v. *Nord Deutsche Insurance Co.*, (1903) IX. Com. Cas., 91.

cess.[1] Moreover, the term is not limited to belligerent acts. For example, it has been held to cover the prohibition by municipal law of the landing of cattle at their destination by reason of their suffering from contagious disease.[2]

Mr. Justice Brett in the case of *Rodocanachi* v. *Elliott*[3] defined Arrest as a "taking with intent ultimately to restore to the owner"; Restraint, as a "prevention of the goods going." But it is difficult to appreciate these subtle distinctions in the meaning of the words, or distinguish between the terms, "*arrests*," "*restraints*" and "*detainments*." They seem to be synonymous—an arrest is a restraint, and a restraint is a detainment.

"*Barratry of the master and mariners.*"

The term "Barratry" includes every wrongful Act wilfully committed by the master or crew to the prejudice of the owner or, as the case may be, the charterer.[4] To constitute barratry, the act must have been committed without the connivance or privity of the owner. Examples of barratry are wrongfully scuttling a ship; or intentionally running her on shore, or setting fire to her; or fraudulently selling both ship and cargo and appropriating the proceeds.

"All other Perils"

"*And of all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandise and ship, etc.*"

[1] Marine Insurance Act, Schedule I. 10, p. 201 *infra*.

[2] *Miller* v. *Law Accident Insurance Society, Ltd.*, (1903) VIII. Com. Cas., 161. IX. Asp. M.L.C., 386.

[3] (1874) II. Asp. M.L.C., 399.

[4] Marine Insurance Act, Schedule I., § 11, p. 201 *infra*.

At first sight it would seem that so comprehensive a wording as "all other losses" would include losses from whatever source arising. But it is not so. The "all other perils, losses and misfortunes" covered by the policy are those of a like kind with those already specially enumerated—perils or losses *ejusdem generis* with those which have been previously specified.[1]

Sue and Labour Clause

> "*And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns to sue, labour and travel for, in and about the defence, safeguard and recovery of the said goods and merchandises and ship, etc., or any part thereof without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of the sum herein assured.*"

The agreement embodied in this well-known and often-quoted clause is supplemental to, and distinct from, the contract of insurance. Although permission is accorded to the assured to use endeavours or to take steps in mitigation of any loss which has occurred to the subject-matter of the insurance, yet it must be always remembered that it is the duty of the assured to do everything reasonably within his power to avert a loss of the property assured, or to minimise a loss which has happened[2]—conventionally expressed, "to act as if uninsured." When any steps have been taken by the assured or their servants with this object in view, the underwriter agrees by this clause to pay his proportion of any expenses which may have been properly so incurred, always provided, how-

[1] Marine Insurance Act, Schedule I., § 12, p. 201 *infra*. *Vide* also p. 39 *supra*.

[2] Marine Insurance Act, § 78 (4), p. 191 *infra*.

ever, that the expenditure has been made with a view to averting or minimising a loss for which the underwriter is liable under his policy.[1] For example, if the insurance be against the risk of "Total loss only," and the expenses are incurred to diminish depreciation by sea-water or other form of partial loss, such expenses would not be recoverable, the risk of partial loss not being covered by the policy.

Although in case of emergency or accident the master becomes agent both for the shipowner and the owner of the cargo, in any steps he takes to minimise the loss in respect of a specific interest he must act prudently, and, if practicable, he should communicate with the owner of the property before he resorts to any extreme measures, such as, for example, the sale of cargo or of ship, when the vessel has put in to a port of refuge. In these days of the cablegram and rapid post, the master is in almost every case in a position to place himself in communication with the owner of the property. But in the old days, before the invention of the telegraph, the situation was, of course, very different.

It will be noted that the permission to "sue, labour and travel for" is specifically given to the "*assured, their factors, servants and assigns.*" It, therefore, follows that the charges contemplated by this clause must be incurred by the assured himself or by his servants, and by them only.[2]

"General average and salvage do not come within either the words or the object of the suing and labouring clause." Those are the words of Lord Blackburn in

[1] *Booth* v. *Gair*, (1863) 33 L.J.C.P., 99. *Kidston* v. *Empire Marine Insurance Co.*, (1866) L.R. 2 C.P., 357.

[2] *Uzielli* v. *Boston Marine Insurance Co.*, (1884) V. Asp. M.I.C., 405.

delivering judgment of the House of Lords in the case of *Aitchison* v. *Lohre*."[1] "General Average" and "Salvage," however, are subjects for future consideration. (*Vide* pp. 97 and 122 *infra*.)

The underwriter is only liable for "sue and labour" charges provided they have been reasonably and prudently incurred. To illustrate this the case of *Lee* v. *Southern Insurance Co.*[2] may be referred to. The insurance was on freight. The vessel stranded, and the cargo was discharged and forwarded to destination by rail, and the shipowner by this means earned and received his freight. The vessel was subsequently floated, so that the cargo could, in fact, have been forwarded by her to destination—a much more economical proceeding than forwarding it by rail. The Court held that, in the circumstances, the underwriter on freight was only liable for so much of the actual expenditure as would have been incurred had the cargo been sent on by the cheaper and, therefore, reasonable and prudent method.

Expenditure under the "sue and labour" clause is borne by the underwriter in the proportion that the amount of his policy, or his subscription, bears to the total insured value. Consequently, if the whole value of the interest is insured under the policy, the underwriter pays the whole of the "sue and labour" charges.

Waiver Clause

"*And it is especially declared and agreed that no acts of the assurer or assured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment.*"

[1] (1879) IV. Asp. M.L.C., 168. See also Marine Insurance Act, § 78 (2), p. 191 *infra*.

[2] (1870) L.R. 5 C.P., 397.

It is hardly necessary for present purposes to examine the origin of this clause. Suffice it to say that it is now incorporated in the printed wording of almost all marine policies, though for many years after its introduction it was attached as a separate clause. It is simply a provision that, in the event of a casualty, either party to the contract—either assured or underwriter—may take such steps, or incur such expenses as are contemplated under the "sue and labour" clause[1] to minimise a loss, without prejudice to the rights of the assured on the one hand and the underwriter on the other.

The Consideration

> "*And so we, the assurers, are contented and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, administrators and assigns to the assured, their executors, administrators and assigns for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured at and after the rate of . . .*"

In these concluding words the underwriter acknowledges having actually received the premium which he has charged for undertaking the risk. As a matter of fact, however, the premium is, unless the case is exceptional, never paid at the time, but at some time subsequently, usually on the 8th of the month following the execution of the policy. The object of the insertion of this acknowledgment is to prevent the underwriter, in case of loss, from raising any question relative to payment of the premium—the consideration due to him. Suppose, for example, that a broker had been employed to effect an insurance on behalf of a client, and that

[1] *Vide* p. 44 *supra*.

the assured had paid the premium to the broker, and the broker became a bankrupt before paying the underwriter. In the event of loss, the underwriter would have to pay the loss in full to the assured[1] without setting off the unpaid premium.[2]

The "Memorandum"

The "Memorandum" at the foot of the policy ("*Corn, Fish, Salt*, etc." (see p. 86 *infra*)) was introduced into the wording of the policy in 1749. It is really a limitation of the underwriter's liability so far as concerns Particular Average, and consideration of it may, therefore, be deferred until that subject is dealt with. (*Vide* also p. 86 *infra.*)

F. C. and S. Clause

The risks of Capture, Seizure and Detention, and the risks of war or warlike operations are often, and more especially in times of war, excluded from the contract of marine insurance. This is effected by the insertion in the policy of what is known as the Free of Capture and Seizure clause—the F. C. and S. clause. The clause takes various forms, and the following is the wording which appears in Lloyd's form of policy, viz.—

> "*Warranted free of capture, seizure and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.*"

It did not appear in the original wording of the policy, but was formerly attached thereto as a special clause or rider. In view of the fact, however, that this clause has

[1] Cf. *Legge* v. *Byas Mosley and Co.*, (1901) VII. Com. Cas., 17.

[2] *Universo Insurance Co. of Milan* v. *Merchants' Marine Insurance Co.*, (1896) II. Com. Cas., 28.

come into daily use, it has for many years been printed as an overriding part of the policy, even if only for the negative purpose of its deletion, and it is now ruled out if the risks of takings at sea, arrests, restraints, detainments, etc., are to remain covered as expressed in the policy. It should be noted that the F. C. and S. clause, when not deleted, overrides the wording of the body of the policy so far as concerns all or any of the words which are opposed to the stipulations of the clause, for example—" arrests, restraints and detainments, etc." [1]

With regard to the term " Capture " of which risk the underwriter is under this clause warranted free, it is not necessary that the capture shall be the result of an act of war. All kinds of capture come within the meaning of the term.[2] Under this warranty it matters not whether the act done be lawful or whether it be unlawful, whether by mutinous passengers, or persons armed with state authority : the underwriter is not liable.

The operation of ordinary municipal law likewise comes within the meaning of this warranty and exonerates the underwriter from liability, as, for example, the prohibition of the landing of cattle at their destination on account of their suffering from contagious disease.[3]

With regard to an insurance against the risk of capture, it is necessary to bear in mind that the abandonment of the voyage owing to *fear* of capture—however reasonable or well-founded the fear may be—will not entitle the assured to recover under the policy. For example, in the case of *Nickels* v. *London and*

[1] *Robinson Gold Mining Co.* v. *Alliance Marine and General Assurance Co., Ltd.*, (1904) IX. Com. Cas., 301.

[2] Cf. *Cory* v. *Burr*, (1883) V. Asp. M.L.S., 109, p. 54 *infra*.

[3] *Miller* v. *Law Accident Insurance Society, Ltd.*, (1903) VIII. Com. Cas., 161, IX. Asp. M.L.C. 386. *Vide* p. 43 *supra*. Cf. also *St. Paul Fire and Marine Insurance Co.* v. *Morice*, (1906) XI. Com. Cas., 153.

Provincial Marine and General Insurance Company[1] a cargo of rice had been shipped on board a Spanish steamer for conveyance from Liverpool to Cuba, the insurance thereon being solely and expressly against war risk only —only against the risks excluded by the F. C. and S. clause in the original policy. After the vessel had sailed, war broke out between Spain and the United States. The master, on learning the fact, put back to Liverpool and landed the cargo, freight thereon being paid in accordance with special stipulations in the bill of lading, which provided that if as a consequence of war the master should deem it imprudent to enter the port of destination he might land the rice at any other convenient port, the whole freight in such event being considered as earned. Some of the rice was warehoused at Liverpool, and some was sold. The plaintiffs claimed to recover under the policy the amount of freight which they had had to pay, and the warehouse charges. But Mr. Justice Mathew held that the loss was not a consequence of hostilities within the meaning of the policy, but was due to the exercise by the master of the power given him by the bill of lading, and that there was therefore no liability under the policy.

With respect to the words "all consequences of hostilities" it will be useful to refer to the decision in what is known as the Hatteras Light Case—*Ionides* v. *Universal Marine Insurance Co.*,[2]—which clearly shows the strict application of the principle of *causa proxima*, a theory which will be considered in the next chapter. During the American Civil War a shipment of 6,500 bags of coffee from Rio de Janeiro to New York was insured under a policy "warranted free from . . . all consequences of hostilities."

[1] (1900) VI. Com. Cas., 15.

[2] (1863) 10 Jurist (N.S.), 18.

The light on Cape Hatteras had been extinguished by the Confederate troops for military purposes, and in consequence the master missed his reckoning, and the vessel went ashore on a reef and eventually broke up. About 120 bags of the coffee were saved by salvors, though these were subsequently appropriated by the Confederate troops, and a further 1,000 bags might have been saved but for the interference of the said soldiers: the rest of the coffee which remained on board the vessel was totally lost. It was held by the Court that the proximate cause of the loss of the 120 bags which were confiscated and the 1,000 bags which were prevented from being salved was a "consequence of hostilities" exempted by the warranty, and that, therefore, the underwriters were not liable for the loss of them. But as regards the remaining 5,380 bags, it was held that the loss of them was due to perils of the sea for which the underwriters were liable, the proximate cause being the stranding of the vessel, which could not be regarded as an ordinary or necessary consequence of the extinction of the light.

In the course of his judgment, Erle, C.J., gave the following illustrations of the application of the principle of *causa proxima*, which are so valuable and at the same time so lucid, that it will be well to paraphrase them here: Suppose a vessel, chased by a cruiser, ran ashore to avoid capture, or put into a bay where there was neither anchorage nor harbour, and being unable to get out, was driven ashore: these would be losses due to "consequences of hostilities." But if the vessel were delayed by being chased out of her course by an enemy, with the result that she subsequently encountered, and was lost in, a storm which she would otherwise have escaped, the loss in that case would be due to perils of the seas. As another instance,

to quote from the interesting judgment of Erle, C.J.: "I will assume that the ship is destined for a port where there are two channels for entrance. In one of these channels there is a torpedo placed for hostile purposes; in the other there is none. If the master of the ship coming into port knows nothing of the torpedo, and the ship is sunk and destroyed, there, of course, the act of hostilities leads directly to the destruction. But suppose that the master is aware that the torpedo is there, and for the purpose of avoiding the torpedo he takes the other channel, and from bad navigation the ship runs aground and is lost, in my opinion that would be a loss not within the exception, because by good navigation she might have passed through safely. I should say that such a loss would be a loss by the perils of the sea, within the meaning of the policy."

CHAPTER III

CAUSA PROXIMA

BEFORE proceeding to consider the various kinds of claims which may arise under the policy and the methods which regulate their adjustment, it is necessary that a clear understanding should be arrived at with regard to the fundamental principle underlying the contract of marine insurance, viz.—that in order to render the underwriter liable for a loss, such loss must have been *proximately* caused by a peril insured against. The well-known legal principle "*Causa proxima non remota spectatur*" (*i. e.* that the *proximate* and not the remote cause is to be looked to) is most rigorously applied to the contract. It will not be inappropriate if in this connexion are quoted the words of Lord Esher, M.R., in the case of *Pink* v. *Fleming*,[1] one of the cases in which this question of *causa proxima* arose. The Master of the Rolls in that case said: "The question, which is the *causa proxima* of a loss, can only arise where there has been a succession of causes. When a result has been brought about by two causes, you must, in marine insurance law, look only to the nearest cause, although the result would, no doubt, not have happened without the remote cause."

The insurance in that case was on a cargo of oranges, etc., and was warranted free from partial loss or damage,

[1] (1890) VI. Asp. M.L.C., 554.

unless such loss or damage was *consequent on collision* with any other ship. The vessel was in collision during the voyage and had to put into a port for repairs. In order that these repairs might be effected it was necessary to discharge the fruit into lighters and subsequently reload it. When the vessel arrived at her destination it was found that the fruit was considerably damaged, partly by the handling involved in putting it in lighters and reloading it, and partly from natural decay which, in consequence of its perishable nature, arose owing to the delay in the voyage. The question was whether or not this damage to the fruit was consequent on or caused by the collision within the meaning of the policy. The Court decided that the loss was not recoverable. "But the proximate cause of the loss," said Lord Esher, M.R., "was the handling of the fruit, though no doubt the cause of the handling was the necessary repairs, and the cause of putting into port for repairs was the collision. There were three causes of the result, but according to the English law of marine insurance, only the last of them is to be looked at for the purpose of determining the liability of the underwriters."

The case of *Cory* v. *Burr*[1] affords another interesting illustration of the strict application of the principle of *causa proxima*. A ship was insured under a time policy in the usual form (including the risk of barratry) and was "warranted free from capture and seizure, and the consequences of any attempt thereat." In consequence of smuggling (barratry) by the master, the ship was seized by Spanish Revenue Officers. In an action on the policy to recover expenses incurred by the owner to obtain the release of his vessel, it was held that the proximate cause of the loss was capture and seizure, and *not* the barratry

[1] (1883) IV. Asp. M.L.C., 109.

of the master, and that therefore the underwriter was not liable.

During the Russo-Japanese war the steamer *Romulus*, insured by a policy "warranted free from capture, seizure, etc.," was captured by a Japanese cruiser, and whilst in possession of a prize crew encountered such heavy ice that she leaked, stranded, and became a total loss. It was held that this was a loss by capture within the meaning of the warranty, and that therefore there was no right of recovery against the underwriter. In the Court of Appeal Cozens-Hardy, M.R., adopting the language of Channell, J., said that the correct view was that the owner lost his ship by capture, and that the Japanese captors lost their prize by shipwreck.[1]

As another example, it may be mentioned that an underwriter is not liable for damage directly caused by rats. But if a rat gnawed a hole in a bath-room pipe on board the vessel, in consequence of which sea-water flowed through the hole into the hold and damaged the cargo, the proximate cause of the damage would be sea-water, and the underwriter would be liable, the rat's partiality for lead pipe having been the remote cause.[2]

If, however, hides and tobacco are shipped in the same vessel, and the hides become putrid by reason of sea-water shipped during a storm, and the stench from them spoils the tobacco, the damage thus occasioned is regarded as having been proximately caused by perils of the sea.[3]

It must be noted that an underwriter is not liable for any loss if it be caused by the wilful act or default of the assured himself. In such an event, the fact of the loss

[1] *Andersen* v. *Marten*, (1908) XIII. Com. Cas., 205 and 321.
[2] *Hamilton* v. *Pandorf*, (1887) VI. Asp. M.L.C., 212.
[3] *Montoya* v. *London Assurance Corporation*, (1851) 6 Exch., 451.

having been proximately caused by a peril insured against is beside the question: the underwriter is exonerated.

But any loss directly caused by a peril insured against must—subject, of course, to the terms of the policy and the amount insured—be paid for by the underwriter, notwithstanding the fact that the said loss has been brought about by negligent navigation of the master or seamen or any other cause not directly insured against, with the one exception which has just been mentioned—the wilful act or default of the assured himself.[1] If a vessel laden with petroleum is destroyed by fire owing to the carelessness of a seaman in throwing away a lighted match: or if a vessel gets ashore through negligent navigation: or if she is damaged by collision owing to a bad, or no, look-out, or to a mistake of the man at the helm: in all such cases the underwriter is liable for the loss sustained.

In the case of goods, the damage must be actua damage to the goods themselves, not suspicion of, or what is called sentimental, damage. Suspicion of damage does not concern the underwriter; and although one part of a shipment, being sound, sells at a lower price than it would otherwise have done in consequence of the other part being sea-damaged, the loss occasioned thereby is not one for which the underwriter is liable. This was decided in the case of *Cator* v. *Great Western Insurance Co. of New York*.[2] Some chests of perfectly sound tea sold at a depreciation in consequence of some chests of the same chop, or brand, having been damaged by sea-water, the suspicion being that the flavour of the sound tea was also affected. The suspicion proved ill-founded, and it was decided that the underwriters were not liable for the loss.

[1] *Vide* Marine Insurance Act, § 55 (2) (*a*), p. 180 *infra*.

[2] (1873) II. Asp. M.L.C., 90.

CHAPTER IV

ACTUAL AND CONSTRUCTIVE TOTAL LOSS

TOTAL losses may be sub-divided into two classes, *actual* total loss and *constructive* total loss. An insurance against the risk of "total loss only" includes the risk of both actual and constructive total loss, unless a stipulation to the contrary appears in the policy. When either an actual or constructive total loss has occurred it, of course, involves payment under the policy of the full sum insured.

Actual Total Loss

An actual total loss occurs (to use the words of the Marine Insurance Act) where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof.[1]

In addition to absolute destruction by a peril insured against, goods are deemed to be totally lost where they are so damaged as to cease to exist in specie, or so that they cannot be rendered capable of arriving at their destination in specie, *i. e.* when they no longer answer to the denomination under which they were insured, or, in

[1] Marine Insurance Act, § 57 (i), p. 181 *infra*.

other words, are incapable of utilisation as the thing insured.[1]

As an illustration, the well-known case of *Roux* v. *Salvador*[2] may be mentioned. The case arose out of a shipment of hides from Valparaiso to Bordeaux. During the voyage the vessel met with heavy weather, sprang a leak, and put into Rio de Janeiro. It was there found that the hides were so damaged by sea-water as to be in a state of incipient putridity. If they had been carried on to Bordeaux they would have become entirely putrid and valueless as hides, and they were consequently sold at Rio de Janeiro. This was held to be a total loss.

Foundering at sea in a gale, or sinking after collision, or a vessel which is "missing" are simple instances of actual total loss of ship, cargo, and freight.

The most important document necessary to substantiate a claim for total loss is, if any of the crew are saved, the "Protest," a document giving a detailed account of the casualty, and sworn before a Notary or Consul. In the case of goods, the invoice and bills of lading relating to the shipment are required by the underwriter, these being evidence that the insurance was *bona fide* and that the goods were actually on board. Of course the policy has also to be produced, and this is usually retained by the underwriter after he has settled the claim, together with the bills of lading as proof of his title to any salvage which there may possibly be.

Constructive Total Loss

A constructive total loss occurs "where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it

[1] *Asfar* v. *Blundell*, (1895) I. Com. Cas., 185; VIII. Asp. M.L.C., 106.
[2] (1836) 3 Bing. N.C., 266.

could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

In particular there is a constructive total loss—

(i) When the assured is deprived of the possession of his ship or goods by a peril insured against, and (*a*) it is unlikely that he can recover the ship or goods, as the case may be, or (*b*) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered: or

(ii) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired: or

(iii) In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival." [1]

As a "nut-shell" illustration of the general principle underlying the doctrine of constructive total loss, it may be useful to quote the words of Maule, J.: "A man may be said to have lost a shilling when he has dropped it into deep water, though it might be possible, by some very expensive contrivance, to recover it." [2] The shilling exists, and it could be recovered at a price, but what man would be foolish enough to spend, say, two shillings in order to recover one? That shilling would be a constructive total loss.

When a casualty has occurred involving a constructive total loss, it is a condition precedent to the right of recovery that the assured shall give to the underwriter what is termed "Notice of Abandonment," [3] unless, as a

[1] Marine Insurance Act, § 60, p. 182 *infra*.
[2] *Moss* v. *Smith*, (1845) 9 C.B. 94 at p. 103.
[3] Marine Insurance Act, § 62, p. 183 *infra*

matter of fact, the circumstances of the case are such as render the giving of such notice unnecessary for the reason that at the time when the assured received information of the loss there would have been no possibility of benefit to the underwriter if notice had been given. In such circumstances the abandonment would be superfluous, and the omission to render it would not deprive the underwriter of any material benefit.

An abandonment is the surrendering of the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto,[1] to the underwriter, and claiming from him a total loss, this cession of right being necessary in order to entitle the underwriter to whatever remains of the property, and to enable him, if he so wishes, to take means for the protection of his own interests. There is no special form of notice of abandonment, but it is usual for the word "abandon" to be used therein.

The next point for consideration is the *time* when notice of abandonment should be given, if the owner of the property elect to abandon. The mere report of the happening of a casualty does not justify an assured in abandoning. He must wait until such sufficient details are to hand as will enable him to form an opinion as to the situation, and to make up his mind as to the course which he will elect to adopt. When this information has reached him he must act without delay. If the assured omit to abandon at the proper time, the right to abandon has gone, unless, indeed, the happening of subsequent circumstances should revive this right, as will presently be seen.

Although notice of abandonment is essential in cases of constructive total loss, and although sufficient information

[1] Marine Insurance Act, § 63 (i), p. 184 *infra*.

must have been obtained to enable a proper decision to have been come to by the assured, it must not be inferred that the state of facts at the time of abandonment is, *ipso facto*, to determine whether or not the property is to be legally regarded as a constructive total loss. Of course, if the underwriter accepts the abandonment these considerations do not arise—he simply pays a total loss, and realises what he can with the property which has been abandoned to him.

But in the event of the underwriter declining (as he usually does) to accept the abandonment, it is then necessary, if the assured desire to legalise his abandonment, *i. e.* to enforce his alleged claim for constructive total loss, for him to issue a writ against the underwriter to recover the loss. And it is the state of facts existing at the time when the writ is issued against the underwriter which has to be taken into consideration to ascertain whether or not a constructive total loss has occurred.[1] It is most important to remember this, as it is a vital distinction between English law and that of most foreign countries. To quote words of Lord Herschell: "If in the interval between the notice of abandonment and the time when legal proceedings are commenced, there has been a change of circumstances reducing the loss from a total to a partial one, or, in other words, if at the time of action brought the circumstances are such that a notice of abandonment would not be justifiable, the assured can only recover for a partial loss."[2]

It must be remembered, however, that a notice of

[1] Cf. *Ruys* v. *Royal Exchange Assurance Corporation*, (1897) II. Com. Cas., 291; VIII. Asp. M.L.C., 294.

[2] *Sailing Ship Blairmore Co.* v. *Macredie*, (1898) III. Com. Cas. at p. 258; VIII. Asp. M.L.C. at p. 434.

abandonment, unless accompanied or followed by a writ, is of no legal value, and it has therefore become usual for underwriters, when declining to accept abandonment, to agree to place the assured in the same position as if, on receipt of the refusal, a writ had actually been issued.

A change of circumstances between the time of the issuing of writ and the time when the action is actually tried is not to be regarded. This was decided in the case of *Ruys* v. *Royal Exchange Assurance Corporation*.[1] In that case a ship, insured against risks of war, was captured. Notice of abandonment was given and declined. A writ was thereupon issued, but before the day of trial the ship was restored to her owners. The Court held, however, that the underwriters were liable for a total loss.

There is one important exception with regard to change of circumstances—the change must not have been brought about by the underwriters themselves. This was decided in the case of the *Sailing Ship Blairmore Co.* v. *Macredie*.[2] The *Blairmore* was sunk at San Francisco by a peril insured against. Notice of abandonment had been given and declined by the underwriters. The latter proceeded to raise the ship at their own expense, which they were justified in doing under the "Waiver Clause." (*Vide* p. 46 *supra*.) The assured then commenced an action to recover a Total Loss, admitting that the actual expenditure necessary for repair at the time of bringing the action would be less than the value of the vessel when repaired, but contending, on the other hand, that the cost of such repairs, plus the cost already incurred by the underwriters in raising the ship would greatly exceed her repaired value. The underwriters, on

[1] (1897) II. Com. Cas., 201 ; VIII. Asp. M.L.C., 294.
[2] (1898) III. Com. Cas., 241 ; VIII. Asp. M.L.C., 429.

the other hand, contended that the expenditure incurred by them should not be taken into account to determine whether or not the vessel was a constructive total loss, and that therefore in the circumstances they were not liable to pay a total loss. But the House of Lords decided that the rule of English law as to change of circumstances between the time when notice of abandonment was given and the time of bringing the action was not applicable to a change brought about by the underwriters themselves at their own expense, and judgment was accordingly given against them.

If in any case an underwriter decides to accept abandonment, he must notify the assured of his election without delay. If the underwriter sends no reply to a tender of abandonment (a proceeding which we can hardly reconcile with present-day business methods) then it must be assumed that he declines to accept it.[1]

In cases where notice of abandonment is declined, there might be a possibility of neither the assured nor the underwriter taking any measures to preserve the property from destruction or lessen the loss which has occurred, from the fear that any such action on the part of either of them would operate to their prejudice—by implication on the one hand, that abandonment had been accepted by the underwriter, and, on the other, that tender of abandonment had been withdrawn by the assured—and it was in order to obviate this uncertainty that the "Waiver Clause" was introduced into the policy. The terms of this clause have already been noticed (*vide* p. 46 *supra*), but for the sake of clearness it may be well to repeat it. It reads—

"*It is expressly declared and agreed that no acts*

[1] *Provincial Insurance Company of Canada* v. *Leduc*, (1874) II. Asp. M.L.C., 338. Marine Insurance Act, § 62 (5), p. 183 *infra*.

of the insurer or insured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment."

Constructive Total Loss of Ship

Having come to an understanding as to what is a constructive total loss in theory, and having considered the question of abandonment inseparable therefrom, a practical illustration of constructive total loss of ship may now be given. Suppose a vessel, with no cargo on board, has encountered a gale which has driven her hard on rocks and very seriously damaged her. What is to be taken into consideration to ascertain whether or not she is a constructive total loss? The vessel would certainly be a constructive total loss if the cost of repairing her, plus the estimated cost of getting her off the rocks to a place of safety, would exceed the value of the vessel when so saved and repaired.[1] For sake of clearness some imaginary figures may be taken. Suppose on the one hand—

The estimated cost of repairing the vessel be	£7,000
And the expenses of getting her off the rocks and into a port of safety, etc.	3,000
TOTAL	£10,000

Suppose on the other hand—

The value of the vessel when repaired would be	£9,000

This would clearly be a case of constructive total loss, for no prudent uninsured owner would incur an expendi-

[1] Marine Insurance Act, § 60 (2) (ii), p. 182 *infra*.

ture of £10,000 to resume possession of a ship of the value of only £9,000.

Again, suppose the estimated cost of repairs, etc., be £9,800, and the value of the vessel when repaired £10,000, whereas the wreck would realise by sale £400. In that case, although the cost of repairs would be less than the value of the vessel when repaired, yet the owner would in such circumstances be pecuniarily better off to the extent of £200 by selling the wreck instead of repairing the vessel: in other words, the value of the wreck plus the cost of repairs would exceed the repaired value of the vessel. But under the Marine Insurance Act, § 60 (2) (ii),[1] the value of the wreck is a factor to be disregarded,[2] so that in the example given the vessel would not be a constructive total loss.

In estimating, in cases of constructive total loss, the amount of the cost of repairs necessitated by perils insured against, no deduction (one-third by custom) is to be allowed in respect of amelioration by reason of new material replacing old; nor is there to be any abatement made on account of the extra cost of the repairs in consequence of the old condition of the vessel, provided, of course, that the warranty of seaworthiness was complied with when she sailed. And no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the vessel would be liable if repaired.[3]

With regard to the repaired value of the vessel with which the cost of repairs, etc., has to be compared, this

[1] *Vide* p. 182 *infra*.

[2] *Hall* v. *Hayman*, (1911) XVII. Com. Cas., 81.

[3] Marine Insurance Act, § 60 (ii), p. 182 *infra*.

is a matter which not infrequently gave rise to some doubt in its ascertainment.[1] This difficulty, however, is now obviated by inserting in policies what is known as the "Valuation Clause," whereby it is agreed that the insured value shall be taken as the repaired value in ascertaining whether a constructive total loss has arisen. As an example of the important effect of this stipulation, reference may again be made to the imaginary figures showing a constructive total loss of a ship—expenditure £10,000: value of ship when repaired, £9,000. Suppose the vessel had been valued in a policy at £12,000, with the valuation clause providing that this value should be taken to be repaired value. Under such a policy the expenditure of £10,000 would be less than the stipulated repaired value £12,000, and there would consequently be no recovery for a constructive total loss.

Constructive Total Loss of Freight

A constructive total loss of freight arises where the ship or goods are so damaged or affected by a peril insured against, that an actual total loss of the freight can only be prevented by the incurring of an expenditure exceeding in amount the freight which would thereby be earned.

It must be borne in mind, however, that when a ship has been abandoned, and the abandonment has been accepted by underwriters on ship, there is held to be a transfer to the latter not only of the ship but also of any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expense of earning it incurred after the casualty; and where the ship is carrying the owner's goods, the insurer

[1] Vide *North Atlantic S.S. Co.* v. *Burr*, (1904) IX. Com. Cas., 164.

is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss.[1] Consequently, if the ship underwriters, after accepting abandonment, repair the vessel and complete the voyage, they are entitled to freight as indicated: and, what is more, no liability would attach to the underwriter on freight inasmuch as the loss had not been caused by a peril insured against, the proximate cause being the abandonment by the shipowner of his vessel to the underwriter on ship.[2]

But if the vessel be at a port of refuge and is there condemned, and the freight is earned by the underwriter on freight by chartering another ship for the purpose of conveying the cargo to destination, the underwriter on freight who has paid a total loss is legally entitled to the freight so earned, and the underwriter on ship is not entitled to any of it.[3]

Any question in the above connexion is, however, now no longer likely to arise, inasmuch as there is usually inserted in policies on hull the following clause, viz.—

> *In the event of total or constructive total loss, no claim to be made by the underwriters for freight, whether notice of abandonment has been given or not.*

Constructive Total Loss of Goods

A constructive total loss of goods arises when the goods are at a place short of the port of destination. The factors to be considered are (*a*) the cost of reconditioning the cargo, if it be damaged, and (*b*) the cost of

[1] Marine Insurance Act, § 63 (2), p. 184 *infra*.

[2] *Scottish Marine Insurance Co.* v. *Turner*, (1853) 1 Macq. H.L. 334.

[3] *Hickie* v. *Rodocanachi*, (1859) 28 L.J. Ex., 273.

forwarding the cargo to destination. If these expenses, either jointly or severally, exceed the value which the goods would have on their arrival at destination, then there is a constructive total loss of the goods. The course which a prudent uninsured owner of goods would adopt provides a solution to the question whether or not there is a constructive total loss. Of course, when the underwriter has settled a constructive total loss, he is entitled to receive the net amount which the goods realise by sale at the port of distress, this being called a salvage, and when the underwriter pays the difference between the total insured value and the net proceeds of the goods, such a settlement is termed a "Salvage Loss."

CHAPTER V

PARTICULAR AVERAGE

BEFORE proceeding to consider claims for particular average, it is necessary that we should clearly understand what is meant by that term. Particular average, so called in contradistinction to General Average and Total Loss, is thus defined in the Marine Insurance Act.[1]

> § 64, 1. A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against; and which is not a general average loss.
>
> 2. Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average.

A vessel, for example, may meet with violent weather, the seas sweeping her decks and causing her to strain severely whereby she sustains serious damage: the damage thereby occasioned is a particular average on ship. And if during the heavy weather sea-water gets into the hold and damages the cargo, the damage to the cargo is particular average on cargo. Further, if the cargo were, for example, sugar, and the sea-water had caused one-fourth of it to dissolve, that would involve

[1] P. 184 *infra*.

a loss to the shipowner of one-fourth of the freigh payable to him on delivery of the sugar at destination—a particular average on freight. If it were necessary, many examples of particular average could be given, but the three referred to will be sufficient as illustrations. The damage, as already mentioned, must be accidentally and fortuitously caused by a peril insured against, and it concerns solely the person interested in the subject-matter of the insurance and his underwriter. This should be well remembered, as it is the distinguishing feature between particular average and general average, the latter being a subject for subsequent consideration.

Having arrived at an understanding as to what the term "particular average" means, it will be well to proceed to consider how claims coming under this category are dealt with in relation to the policy.

Particular Average on Ship

First of all let us deal with claims for particular average on ship. Suppose a vessel has encountered heavy weather which has seriously strained her: or that her propeller has fouled floating wreckage, breaking off the blades, and damaging the shafting in consequence of the sudden shock. The first question is: How is the amount of the underwriter's liability to be ascertained? The measure of the underwriter's liability is ordinarily the *actual* cost of repairing the damage occasioned by the perils insured against, less deductions "new for old" (one-third or one-sixth as the case may be), unless, as is now usual, the policy provides that the average shall be paid in full, without any deduction "new for old." It is most important to remember that in the settlement of particular average claims on hull no regard is paid to the insured value

of the vessel as agreed between the assured and the underwriter. It is the reasonable actual outlay for repairs which forms the basis of the claim. If, for example, the vessel be actually worth, say, £50,000, and she has been valued for insurance purposes, and has been insured for, say, only £45,000, the underwriters have, nevertheless, to pay on the basis of the full reasonable cost of executing the repairs.

Let us next consider as to the methods to be adopted in the effecting of repairs. In the first place, it is necessary that the repairs shall have been prudently effected, and that the cost of them is reasonable, otherwise the additional expenses in consequence of imprudent or unreasonable repair must not be charged against the underwriter. Further, the underwriter is not liable, as has already been noticed, for what is termed "wear and tear."[1] The underwriter must also have the benefit of trade discounts and be credited with the value of all old materials, such as old iron, ropes, etc.

When the total amount of the particular average has been arrived at by reference to, and dissection of, the repair-bills, it only remains to ascertain the amount recoverable under the various policies. This is done by apportioning the particular average in the proportion which each underwriter's policy, or subscription, bears to the total insured value.

The liability of the underwriter on ship is ordinarily limited to the amount of his policy so far as any one accident is concerned. But it may, and often does, happen, that a vessel meets with several accidents, and the liability of the underwriter under a time policy, or voyage policy for that matter, may in consequence far exceed the amount of his policy. Suppose, for example, a

[1] *Vide* p. 39 *supra*.

vessel has during the currency of the policy been damaged, has been repaired, and is subsequently totally lost. The underwriter would in such circumstances have to pay a total loss in addition to the claim for particular average.

It must not be inferred, however, that a shipowner is bound to have his vessel repaired at the first opportunity. He may, if he so elect, defer executing the repairs, though if the damage is increased by reason of the delay, the underwriter must not be prejudiced in consequence. If the repairs are not effected during the currency of the policy, the shipowner must wait until the expiration of the risk before he can recover the amount of his claim: and if, in such circumstances, the vessel be totally lost before the expiration of the risk, then the owner can recover for a total loss under his policy, but not for the particular average damage, inasmuch as the repairs had never been effected, and he had consequently suffered no loss so far as they were concerned.[1] And if in such a case it should happen that the total loss was not attributable to a peril insured against, then there would be no liability under the policy whatever, either for a total loss or for unrepaired damage.[2]

Suppose that particular average repairs have not been effected, that the vessel has not been totally lost, and that the policy has expired. In such a case the underwriter's liability in respect of the particular average is ordinarily ascertained by estimating the cost of repairing the damage attributable to the accident.

An interesting and important point once arose in connexion with unrepaired particular average damage and subsequent total loss of the vessel; and it will probably be better understood by putting it in simple

[1] Marine Insurance Act, § 77 (2), p. 191 *infra*.

[2] *Livie* v. *Janson*, (1810) 12 East, 648.

form. A vessel, insured with underwriter A for a voyage, sustained particular average damage, and the damage was unrepaired when the policy expired. Immediately on the expiry of A's policy the vessel was covered for a like sum by a policy of underwriter B. Whilst covered by B's policy, and before the particular average damage attaching to A's policy had been repaired, the vessel was totally lost. What are the respective liabilities of underwriters A and B? In these circumstances A would have to pay the estimated cost of repairing the particular average damage, which would be really a clear profit to the owners, whilst B would have to pay a total loss.[1]

It may sometimes happen, however, that the ship is sold unrepaired by the owner during the currency of the risk. When that is the case, the amount recoverable is ordinarily computed on the basis of the estimated reasonable cost of repairs, provided, however, that such estimated cost of repairs does not exceed the amount of loss as actually ascertained by the sale, a factor which must necessarily be taken into consideration in determining the underwriter's liability.[2] It is a matter of regret, however, that no judicial pronouncement has been given as to what is to be regarded as the sound value of a vessel for purposes of ascertaining the loss by sale—whether it is to be her value at the commencement of the risk, or just before the accident, or what other value.

There is one question which must be referred to before leaving this subject, and that is the method of dealing with dock dues—*i. e.* cost of dry-docking—where repairs on account of owners, and repairs on account of underwriters, are both executed concurrently in dry dock.

[1] *Lidgett* v. *Secretan*, (1871) I. Asp. M.L.C., 95.

[2] *Pitman* v. *Universal Marine Insurance Co.*, (1882) IV. Asp. M.L.C., 544.

The first case for consideration is that of the *Vancouver*.[1] The vessel on arrival at San Francisco from Hong Kong, was found to be very foul, and it was necessary before she could put to sea again to dry dock her for the purpose of cleaning, scraping and painting her, and it was with this object alone that she was put into dry dock. Is was then discovered, which was not known before, that her stern post had been fractured whilst at sea. This damage was accordingly repaired, the repairs taking eight days to effect in dry dock, during the first three days of which cleaning, painting, etc., were going on simultaneously. By the operations being performed simultaneously, three days' dock dues were saved. The question was whether the underwriters were liable for any portion of the dock dues during the first three days whilst the cleaning, etc., and the repairs of the damage were going on concurrently, and the House of Lords held that in the circumstances the dock dues for the first three days should be divided equally between the shipowner and the underwriter. It should be noted that in this case the cost of placing the vessel in dry dock was not in dispute—it was only the cost of the three days' dock dues for hire of the dock. But the judgment apparently extends also to the cost of entering and leaving the dry dock.

The second case is that of the *Ruabon*.[2] The vessel grounded, and was dry docked for the purpose of examination, and, in case of need, of repairing the consequent average damage. This was in January 1896. In the following November, it would have been necessary, in the ordinary course, for the vessel to have been put in dry

[1] *The Marine Insurance Co.* v. *China Transpacific S.S. Co.*, (1886) VI. Asp. M.L.C., 68.

[2] *Ruabon S.S. Co.* v. *London Assurance Corporation*, (1899) V. Com. Cas., 71.

dock for Lloyd's Register classification survey in order to retain her class, but the rules of Lloyd's allow the survey to be anticipated if the owner so elect. The owners in this case took advantage of the opportunity of the vessel being in dry dock in January for average repairs, to have her surveyed for the purpose of retaining her class. The underwriters contended that in these circumstances a moiety of the docking expenses—which would otherwise have had to be specially incurred—should be borne by the owners. But the House of Lords, reversing the decisions of the Commercial Court and Court of Appeal, decided that the docking expenses (including the cost of putting in and taking out of dock, as well as dues for the hire of the dock) were to be borne solely by the underwriters, and that the owners were not liable to pay any proportion thereof.

It follows from the judgments in the latter case that a shipowner is entitled to avail himself of any "incidental advantage" where damage has arisen in consequence of a peril insured against which has necessitated repairs in dry dock at the expense of the underwriter, provided that the repairs executed on the shipowner's account are not immediately necessary for maintaining the vessel's seaworthiness. The following is the Rule of Practice adopted by the Association of Average Adjusters in this connexion, viz.—

> "That where repairs on owner's account which are immediately necessary to make the vessel seaworthy and which can only be effected in dry dock are executed concurrently with other repairs, for the cost of which the underwriters are liable, and which also can only be effected in dry dock, the cost of entering and leaving the dry dock, in addition to so much of the dock dues as is common to both

repairs, shall be divided equally between the shipowner and the underwriters."[1]

Next may be briefly considered the method of dealing with expenses incurred in removing a vessel for repair. If a vessel is in need of repair at any port and is removed thence to some other port for the purpose of repairs, either because the repairs cannot be effected, or cannot be effected prudently, the necessary expenses incurred in moving the vessel to the port of repair are deemed to be part of the cost of repair; if, after repairs, she forthwith returns to the port from which she was removed, the necessary expenses incurred in returning are also allowed; but, if she loads a fresh cargo at the port of repair instead of so returning, then no expenses subsequent to the completion of repairs are allowed. Any new freight earned or expenses saved in relation of the current voyage of the vessel are to be deducted from the expense of removal. Ordinary expenses in fulfilment of a contract of affreightment are not admitted, although such expenses are increased by the removal to a port of repair.[2]

It has been already mentioned that underwriters are not liable for damage by wear and tear. It may also be added that they are not liable for loss or damage which has arisen in consequence of any part of a vessel's equipment being ordinarily used for the purpose for which it was intended, nor are they liable for the loss of any gear improperly carried in insecure places. It may be useful if the Customs of Lloyds[3] in this connexion are here enumerated. They are three in number and are as follows, viz.—

[1] *Vide* p. 230 *infra*.

[2] Rules of Practice of the Association of Average Adjusters: *Expenses of removing a vessel for repair*, p. 229 *infra*.

[3] Now incorporated in the Rules of Practice of the Association of Average Adjusters.

i. Sails split by the wind or blown away while set, unless occasioned by the ship's grounding or coming into collision, or in consequence of damage to the spars to which the sails are bent, are not charged to underwriters.

ii. Rigging injured by straining or chafing is not charged to underwriters unless such injury is caused by blows of the sea, grounding or contact, or by displacement, through sea peril, of the spars, channels, bulwarks or rails.

iii. Water casks or tanks carried on a ship's deck are not paid for by the underwriters as general or particular average; nor are warps, or other articles when improperly carried on deck.

An underwriter on ship is not liable for the wages and provisions of crew during repairs,[1] unless, of course, any members of the crew are specially retained to do work which would otherwise have necessitated the employment of outside labour, in which case the wages of the men so retained would be allowed.

If a vessel be at a port where it is deemed prudent, with a view to economy, to effect only necessary temporary repairs, the permanent repairs to be effected subsequently at some other port, then the underwriter is liable for the reasonable cost of both temporary and permanent repairs. And the same remark, of course, also applies to the case of a vessel at a port where it is only possible to effect necessary temporary repairs.

Particular Average on Freight

Freight, as is well known, is money payable either for the hire of a vessel or for the conveyance of cargo from one port to another. It will therefore be apparent that

[1] *Robertson* v. *Ewer* (1886) I.T.R., 127.

freight of itself is not capable of sustaining actual, *i. e.* physical, depreciation by perils insured against in the same way as a vessel or goods. To constitute a particular average on freight, therefore, there must be a partial loss in respect of it. It is impossible, in the space of this handbook, to deal with the technical questions which have arisen, and may arise, in connexion with losses of freight, and especially in connexion with chartered freights, and, therefore, an example of a simple particular average on freight must suffice. Suppose a cargo of sugar is shipped, say, from Demerara to London, no part of the freight being prepaid, and during the voyage, and owing to a peril insured against, one-third of the sugar melts. There is clearly a loss of one-third of the freight, and the underwriter would, subject to the terms of the policy, be liable for one-third of the amount for which the freight was insured.

The measure of an underwriter's liability is based on the valuation of the freight in the policy. If, however, a vessel is at her loading port, and only part of the cargo to which the valuation of freight was intended to apply is on board, or actually contracted for at the time when the loss occurs, then the underwriter is only liable to pay on such proportion of the amount insured as the part of the cargo actually on board, or contracted for at the time of the loss, bears to the whole of the cargo which it was intended to ship.

It is important to remember that in order to give rise to a claim under a policy on freight, the loss must, as in all other cases, have been caused by a peril insured against. A point to be noted is that English law recognises no payment of freight for a partial performance of the voyage, known as *pro rata* or "distance" freight. If owing to perils of the sea, the shipowner is prevented

from delivering the cargo at the port of destination, he cannot require the merchant to pay anything for the portion of the voyage which the vessel has performed. In this respect English law differs from those of most, if not all, foreign nations, which recognise the payment of what is called "distance" freight, *pro rata itineris peracti* (proportionate to the mileage of the voyage actually performed), and in some cases even full freight.

Now-a-days it has become the custom for shipowners to demand payment of freight in advance. When freight is so paid in advance, the shipowner has no longer an insurable interest in it, as he runs no risk of losing it, for he cannot be called upon to refund any portion of it whether the voyage be completed or not. It is, therefore, at the risk of the merchant or charterer who has had to pay it, and who would be the loser if the vessel were lost, and the insurable interest consequently vests in either of them, as the case may be, and they can, therefore, insure it accordingly as advanced freight, or include it in the value of the cargo.

When a merchant insures his goods, and includes in the valuation (as he usually does) the amount of freight which he has paid in advance, the fact of this inclusion should, as a general rule, appear on the face of the policy, the frequently used wording being "On Goods, valued at £ (including £ advanced freight)." It has been decided by our Courts that in such a case, whether the amount of the advanced freight is specified in the policy or not, the policy is to be treated as a policy on valued "goods" and not as a separate insurance on advanced freight. In case of depreciation to cargo, therefore, the valuation (including the amount of advanced freight) is the basis for calculating the amount of the underwriter's liability, the advanced

freight being considered as merged in the value of the cargo.[1]

Particular Average on Cargo

A claim for particular average on cargo arises when the cargo has been either partially damaged by a peril insured against, or a portion of the cargo has been totally lost. If, for example, of a shipment of, say, 100 bales of wool, 25 arrive at their destination depreciated by sea-water to the extent of 20 per cent.; or 5 bales arrive totally worthless; or the whole 100 bales arrive depreciated to the extent of 90 per cent., or perhaps even 99 per cent.; in all these cases the claim is one of particular average. Merchants sometimes seem to be under the impression that if their cargo arrives damaged, the underwriter ought to pay them the difference between the insured value of the goods and the net amount which they realise by sale, thereby involving an underwriter in the effect of a rise or fall of the market, a matter which does not concern him.[2] The kind of settlement just referred to is termed a "salvage loss," and can only arise when cargo is necessarily sold short of its destination. This point has already been dealt with when considering constructive total loss of cargo.[3] When cargo has arrived at its destination, the claim on the underwriter is on the basis of particular average, which will be directly explained.

If the cargo arrives at its destination unidentifiable, owing to obliteration of marks by perils insured against, so that it cannot be delivered to consignees, such a con-

[1] *Thames and Mersey Marine Insurance Co.* v. *Pitts, Son and King*, (1893) VII. Asp. 302.

[2] *Lewis* v. *Rucker*, (1761) 2 *Burr*, 1167.

[3] *Vide* p. 68 *supra*.

tingency does not render an underwriter liable for a total loss, as the cargo has in fact arrived, though its value can only be ascertained when the proceeds of the whole of the unidentified cargo have been duly apportioned amongst the claimants entitled thereto. In such a case, therefore, any damage to the cargo by perils insured against should be treated as particular average.[1]

Now let us consider how the depreciation of damaged cargo is to be ascertained. Sometimes it is assessed by brokers who issue certificates stating the nature of the damage, and certifying as to the value which the goods would have possessed had they arrived in sound condition, and also certifying to their values in their damaged state. Or sometimes the depreciation is expressed as so much per cent. But a frequent method of ascertainment is by resort to public auction.

When the sound and damaged values have been ascertained, the depreciation has to be arrived at by a comparison of the gross (not *net*) sound value with the gross proceeds.[2] This shows the amount of the loss, which is usually worked out at so much per cent. on the sound value.

The reason for comparing gross values instead of net values is, firstly, to avoid market fluctuations becoming a factor in the loss; and, secondly, because by a comparison of net proceeds, although the actual loss would remain unaltered, the ratio of depreciation would be increased, to the prejudice of the underwriter, by reason of the diminution in the amount of the sound value by the deduction of ordinary charges. This will probably be made clearer by the following example.

[1] *Spence* v. *Union Marine Insurance Co.*, (1868) L.R. 3 C.P., 427.

[2] *Johnson* v. *Sheddon*, (1802) 2 East, 581.

GROSS VALUES.		NET VALUES.	
		Sound Value . .	£100
		Less Charges .	10
Gross Sound Value .	£100	*Net* Sound Value . .	£90
		Proceeds . .	£50
		Less Charges	10
Gross Proceeds . .	50	*Net* proceeds . . .	40
Loss . . .	£50	Loss again . .	£50
Depreciation 50 per cent.		But the *depreciation* on a Sound Value of £90 is $55\frac{1}{2}$ per cent.	

And now comes in a fundamental difference between treatment of claims for particular average on ship and claims for particular average on cargo. It will be remembered that in the former the reasonable cost of repairs to a vessel is paid for by underwriters without regard to the insured value. But in the case of cargo, the percentage of depreciation, ascertained in the manner above explained, is always applied to the insured value to arrive at the amount of the liability of the underwriter. If the insured value is less than the gross sound value, then the underwriter pays proportionately less of the loss. But if the insured value is more than the gross sound value, then the underwriter pays proportionately more. The merchant receives less or more than the loss which he has actually sustained, as the case may be.

For example :—

A sea-damaged bale of wool, gross sound value .	£10
,, proceeds . .	5
Loss	£5

or a depreciation of 50 per cent.

If the insured value is £8 the underwriter is liable for 50 per cent. of it, or £4.

Or if the insured value is £12 the underwriter is again liable for 50 per cent. of it, or £6.

This principle of applying the percentage of loss to the insured value was laid down in the celebrated case of *Lewis* v. *Rucker*[1] as long ago as 1761. By its adoption the underwriter is unaffected by any fluctuations of the market—a matter with which, as already observed, he has no concern, and the principle of comparing gross sound value with gross proceeds was laid down in an equally well-known case, *Johnson* v. *Sheddon*,[2] in 1802.

Some articles, such as Tobacco, Wool and Hides, etc., gain in weight, in consequence of absorption of sea-water. In such cases the underwriter must not be prejudiced thereby, so any increase has to be deducted when calculating the sound value. Whether or not an increase in weight has occurred is ascertained by means of a proportion sum as follows: If the sound bales weighed, say, 2,000 lbs. per invoice and delivered, say, 2,200 lbs. per landing weights, then the damaged bale which weighed, say, 250 lbs. per invoice should deliver in proportion 275 lbs.; and if this weight, so ascertained is less than the landing weight, the difference between the two shows the increase in weight by water. In the case of wool, if the actual increase cannot be ascertained, it is taken at 3 per cent. In the case of tobacco which has been cut off from the original bale, the allowance for water in the cuttings is taken to be one-fourth.

In the case of some articles, cotton, for example, it is often expedient to pick off the damaged cotton, leaving the bale, so picked, for sale as in sound condition. The loss ascertained in this manner is called a "Pickings

[1] Burr, 1167. [2] East, 581.

Claim." Similarly with coffee: the damaged bag is "skimmed," *i.e.* the damaged berries are removed, and the loss is called a "Skimmings Claim." The losses ascertained in this way are by common usage paid by underwriters irrespective of percentage.

The next subject to be dealt with is the ascertainment of the insured value. If the value is specified in the policy, as for example, 100 bales of wool insured for £1,000 and valued in the policy at £10 per bale, the insured value of each bale is fixed and apparent. But suppose the policy is, for example, on 100 bales wool valued at £1,000 including freight advanced (freight advanced becoming merged in the value of the goods, as previously mentioned), the question arises as to how the insured value of any particular damaged bale or bales is to be ascertained. As a rule this is ascertained by a comparison of invoice values, on the basis of a rule-of-three sum. If the total invoice value of the whole shipment be insured for so much, then the invoice value of the damaged bale, case or bag, or whatever it may be, will be insured in proportion for so much. If, however, the invoice should not be available for the computation of the insured value, then calculations on the same principle are made on the account sales, on the basis of sound value.

When the liability of the underwriter has been ascertained by applying the percentage of depreciation to the insured value, there must then be added to the amount so ascertained any *extra* charges incurred in consequence of the damage, including the fee for survey. These are allowed so far as they have been incurred in connexion with goods which are so damaged as to give rise to a claim under the policy; but the underwriter is not liable for any such charges so far as they relate to

goods found to be in sound condition,[1] or to damage which does not give rise to a claim under the policy.[2]

In event of a particular average claim arising owing to an absolute total loss of part of the interest insured, *e.g.* a barrel or several bags of sugar "washed out," the amount of the underwriter's liability is the insured value of the portion lost, ascertained in the manner already described.

[1] *Lysaght* v. *Coleman*, (1894) VII. Asp. M.L.C., 552.
[2] *Vide* p. 88 *infra*.

CHAPTER VI

THE "*MEMORANDUM*"

THE next subject for consideration is the "Memorandum," as it is called. It reads as follows, viz.—

> *N.B.—Corn, Fish, Salt, Fruit, Flour and Seed, are warranted free from average, unless general, or the ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides and Skins, are warranted free from average under Five Pounds per cent.; and all other goods, also the ship and freight are warranted free from average under Three Pounds per cent., unless general or the ship be stranded.*

The Memorandum was introduced into the policy in 1749, and, as is apparent, it provides a minimum limit to the underwriter's liability in respect of claims for particular average by exempting him from such claims, either absolutely or under certain percentages, unless the ship be "stranded"; and it has now-a-days become usual to add thereto the words "sunk or burnt," and sometimes also the words "or on fire, or the damage be caused by collision with another ship or vessel." With regard to the stipulated "percentages," they are not to be confused with the so-called "franchises" which prevail in continental insurances. If the damage amounts to, or exceeds, the stipulated percentage, the underwriter pays the whole of the damage—not solely the excess of the

percentage, as would happen in the case of a so-called "franchise."

The articles enumerated in the Memorandum are to be understood in their mercantile sense. The word "corn" includes peas and beans, and malt, but it does not include rice.[1] "Salt" does not include saltpetre.[2]

The word "average" in the phrase "average unless general," means particular average.

In order to ascertain whether or not the memorandum percentages have been reached, regard can only be had to particular average—depreciation or loss of part—of the subject-matter of the insurance. It follows, therefore, that neither a general average loss,[3] nor extra charges incurred in order to substantiate a claim, such as survey fees, etc., are to be added to the particular average damage in order to make up the required percentage; but such extra charges are payable by underwriters provided the requisite percentage has been reached.

With regard to what are technically known as Particular Charges—sometimes called Special Charges—charges which are incurred solely in connexion with the particular interest to which they relate, they must be, firstly expenses incurred by the assured or his agent in preserving or recovering the subject insured from loss by the perils insured against. Such charges are recoverable from underwriters under the "sue and labour" clause, which has already been dealt with.[4] It will doubtless be remembered that expenditure under this clause must be made with a view to averting or minimising

[1] *Scott* v. *Bourdillon*, (1806) 2 B. & P. (N.R.), 213.

[2] *Journu* v. *Bourdieu*, (1787) Marshall, II. Ed. 223.

[3] *Price* v. *A1 Ships Small Damage Association*. (1889) VI. Asp. M.L.C., 445.

[4] P. 44 *supra*.

a loss for which the underwriter is liable. Secondly, Particular or Special Charges are recoverable from underwriters, apart from the "sue and labour" clause, as a loss caused by a peril insured against when they have been necessarily incurred in consequence of such a peril.

Particular charges incurred at a port of refuge cannot be added to the amount of damage sustained in ascertaining whether the memorandum percentage has been reached or not.[1] It would seem that if the insured value of the thing insured is less than its actual value, then the underwriter pays only a proportionate part of such charges, in the ratio that the insured value bears to the actual value; otherwise, he pays them in full.

As an example of Particular Charges incurred at a port of refuge, let us take as an instance a shipment of skins, warranted free from particular average under 5 per cent. The vessel having put into a port of refuge in consequence of heavy weather, the skins are found damaged by sea-water, and by incurring an expenditure of 2 per cent. this damage is arrested, and only amounts on arrival at port of destination to 4 per cent. The underwriter is liable for the expenses (2 per cent.) under the "sue and labour" clause, but he is not liable for the particular average (4 per cent.) although the charges and the particular average together (amounting to 6 per cent.) exceed the stipulated percentage of 5 per cent.

Particular charges incurred at the port of destination

[1] *Kidston* v. *Empire Marine Insurance Co., Ltd.*, (1866) L.R. 2 C.P., 357.

[2] *Cf. Kidston* v. *Empire Marine Insurance Co., Ltd.*, (1866) L.R. 2 C.P., 357.

to re-condition goods which have arrived damaged by a peril insured against, and in respect of which there is a right of recovery under the policy, are paid by underwriters when the particular average itself amounts to the required percentage: or when the charges come within the terms of the "sue and labour" clause. When they are so recoverable, the amount which the underwriter pays is the actual expenditure, even though the insured value be less than the sound value.

The question will doubtless suggest itself whether successive losses happening at different times during the voyage, each one of itself being under the requisite percentage, may be added together in order to render the underwriter liable. So far as concerns insurances on hull, etc., for "voyage," and cargo and freight for "voyage," this can undoubtedly be done, for the time for ascertaining the damage is the end of the voyage. With regard to insurances on hull, etc., for "time," however, it has been decided that in order to ascertain whether the required 3 per cent. had been reached, the shipowner can add together the losses occurring on one round voyage only, and not losses occurring during the whole currency of the policy.[1] A clause of the Institute of London Underwriters provides for this in special terms, and specifies what is to be actually understood as one round voyage, as follows, viz.—

> "*The warranty and conditions as to average under 3 per cent. to be applicable to each voyage as if separately insured, and a voyage shall be deemed to commence at one of the following periods to be selected by the Assured when making up the claim, viz.: at any time at which the vessel*

[1] *Stewart* v. *Merchants' Marine Insurance Co.*, (1885) V. Asp. M.L.C., 506.

(1) begins to load cargo or (2) sails in ballast to a loading port. Such voyage shall be deemed to continue during the ensuing period until either she has made one outward and one homeward passage (including an intermediate ballast passage, if made) or has carried and discharged two cargoes, whichever may first happen, and further, in either case, until she begins to load a subsequent cargo or sails in ballast for a loading port. When the vessel sails in ballast to effect damage repair, such sailing shall not be deemed to be a sailing for a loading port although she loads at the repairing port. In calculating the 3 per cent. above referred to, particular average occurring outside the period covered by this policy may be added to particular average occurring within such period provided it occur upon the same voyage (as above defined), but only that portion of the claim arising within such period shall be recoverable hereon. The commencement of a voyage shall not be so fixed as to overlap another voyage on which a claim is made on this or the preceding policy."

Average Clauses, Series, and Separate Valuations

The question of average clauses, series, and separate valuations next requires consideration. As vessels increased in size and cargoes in magnitude, it was found that, although the percentages mentioned in the Memorandum were comparatively low in themselves, yet, in cases of vessels and cargoes of high values, the loss would have to be considerable in amount in order to enable the assured to recover under the policy, unless, of course, the vessel had been "stranded, sunk or burnt." For instance, in the case of a vessel valued at, say, £100,000 no claim under £3,000 would be recoverable;

and so with cargo of one commodity and comprised in one valuation. In order to alleviate the severity of the Memorandum in this respect, there were gradually introduced into policies on hulls, etc., of vessels separate valuations for the "hull," "machinery," "fittings," etc., and a proviso—"Average payable on each valuation separately or on the whole." For the same reason the so-termed "average clauses" were introduced into policies on cargo. The effect of these average clauses is that in ascertaining whether the Memorandum percentage has been reached, the cargo shall be considered as sub-divided into smaller divisions, each of these sub-divisions being known as "series," and if the damage amounts to the necessary percentage on a "series," then the loss shall in respect of such series be recoverable under the policy.

The idea originally underlying the introduction of "series" by means of "average clauses" was, apparently, to subdivide the cargo, for purposes of Memorandum percentages, into lots of roughly about £100 value, but now-a-days, under the stress of competition, the original idea seems to have been lost sight of. Of course, if the particular average exceeds the required percentage on the whole interest, the "average clause" does not of necessity come into operation. The "average clause" varies according to the subject-matter of the insurance. Cotton, for example, ordinarily pays average on each 10 bales; tea on each 10 chests, 20 half-chests or 40 boxes; wool from Australia on each bale; indigo on each package; cocoa on 10 bags; and so forth.

The "average clause" usually stipulates that the "series" shall be computed on the basis of "following landing numbers," *i.e.* the order in which they are landed It is a general practice, however, in landing

cargo, to set aside, in the case of a large shipment or mark, all the damaged packages and regard them as landed last, their numbers appearing all together at the end of the dock landing account. At first sight this procedure may seem to inflict a hardship on the underwriter as regards the computation of "series"; but, on the other hand, one must not overlook the spread of damage which would inevitably ensue in consequence, for example, of a bag of rice wet with sea-water being in close contact with sound bags in the same sling.

It often happens that the number of packages in a shipment does not lend itself to division into a complete set of "series." For example, a shipment of 53 bags cocoa, average on each 10 bags, can be divided into 5 series of 10 bags each. But how about the remaining 3 bags? That would then be termed a "tail series," and the practice is to allow claims for particular average on this "tail series" provided that the damage amounts to the required percentage on its value. So in the example mentioned, if the damage amounted to 3 per cent. on the value of the last 3 bags of the cocoa, the loss would then be recoverable under the policy, although the depreciation did not amount to the stipulated 3 per cent. on a series of 10 bags.

"Unless General"

With regard to the words "unless general" in the Memorandum, these words are not to be read as meaning that if a general average has occurred its stipulations are to be inapplicable. It would be better to substitute the word "except" for "unless" and, for clearness' sake, the concluding portion of the Memorandum may be paraphrased "and all other goods, also the ship and

freight, are warranted free from average under Three Pounds per cent., except general average, or unless the ship be stranded."

Stranding

Having noticed the stipulations in the Memorandum, those contingencies which render its terms inoperative have next to be considered. If there is a "stranding" of the vessel, the underwriter has to pay particular average irrespective of percentage—and whether or not the damage is in any way attributable to the stranding is beside the question. For example, if a vessel strands and sustains no damage in consequence, and subsequently (or previously) on the voyage meets with a storm in which her boats and fittings are carried away, the underwriter on hull is, under the terms of the Memorandum, liable for this loss although it has no possible relation to the stranding. Again, if a steamer strands, and gets off without a spoonful of water having entered her hold, and she had previously met with, or subsequently encounters, violent weather causing damage to her cargo, the underwriter on cargo is liable for the whole of the damage sustained, though none of it was directly caused by, or attributable to, the stranding.

It is, therefore, important to ascertain, as exactly as may be, what constitutes a "stranding." A vessel is "stranded" within the meaning of the Memorandum, when, in consequence of some accidental or unusual occurrence, she comes in contact with the ground or other obstruction, and remains hard and fast upon it. It may be on the sea shore, it may be on rocks, on piles which have been driven into the harbour-bed, and so forth.

There are two important features, however, which are necessary in order to constitute a stranding:—

Firstly, the grounding must have been accidental or unusual. If the taking of the ground was in an accustomed place and manner, as for instance, in a tidal harbour, then there is no stranding. If the ground be taken in an unusual place, and in an unusual manner, then there is a stranding.

Secondly, in order to constitute a stranding, there must have been an actual remaining fast upon the obstruction, and not a mere "touch and go." A mere striking of the ground will not be sufficient, however violent the striking may be; nor will merely a temporary retardation of the vessel's way constitute a stranding. Nor will it be a strand if she drags through the mud or bumps over a bar. No definite period of time can be fixed during which it is necessary for the vessel to have remained hard and fast. She must, however, have actually remained fast, but for what period of time has never yet been judicially determined. A remaining fast for a minute and a half has been held insufficient to constitute a stranding.[1]

In policies on hull for "time" and "voyage" there is not infrequently inserted the following clause of the Institute of London Underwriters, which appreciably limits the effect of the ordinary terms of the Memorandum, viz.—

> *Warranted free from particular average under* 3 *per cent., but nevertheless when the vessel shall have been stranded, sunk, on fire, or in collision with any other ship or vessel, underwriters shall pay the damage occasioned thereby, and the expense of sighting the bottom after stranding shall be paid if reasonably incurred, even if no damage be found.*

[1] *McDougall* v. *Royal Exchange Assurance Corporation*, (1816) 4 M and S., 503.

"Sunk"

It has already been mentioned that the words "sunk or burnt" are usually added after the word "stranded." The word "sunk" is really a surplusage, because every ship which is actually "sunk" must *ipso facto* be "stranded." One would hardly have supposed that the term "sunk" would have left any room as to the meaning to be attached to it, but it came before the Court for decision in the case of a vessel carrying a cargo of match splints from Quebec to London. The vessel arrived in the Thames with water over her deck as far aft as the mainmast; abaft the mainmast was dry, and so was the captain's cabin and hurricane deck. The cargo was considerably wetted, though a portion of it was discharged in a dry condition. The assured contended that the vessel had been sunk within the meaning of the term, inasmuch as she had sunk as far as she could, in view of the nature of her cargo. It was admitted at the trial, however, that had the cargo become more saturated, the vessel would have sunk further down in the water. It was decided that this was not a sinking within the meaning of the term.[1]

"Burnt"

With regard to the exception "burnt," it should be carefully noted in the first place that it is necessary to consider whether the circumstances are such as would justify the vessel being regarded as technically "burnt." It was formerly thought that if the ship herself was on fire, however slight the fire might be (such as the burning of a beam, for example), that was sufficient to come within the Memorandum exception. But this idea wa

[1] *Bryant and May* v. *London Assurance Corporation*, (1886) 2 T.L.R., 591.

dispelled by the judgment in the case of the *Glenlivet*,[1] which decided that the burning must be of such an extent that a jury would find that the vessel must be considered a burnt ship. It is in consequence of this decision that the words "or on fire" are sometimes inserted after, or substituted for, the word "burnt" as previously mentioned, with the object of mitigating the strictness of this exception.

"Or in Collision"

Further there is sometimes added to the Memorandum, after the word "burnt," or "on fire," as the case may be, the words "or in collision." When that addition is made, it should be noted that the collision refers to a collision with another ship or vessel only, and not with any other object, such as dock gates and the like.[2] The case of *Chandler* v. *Blogg*[3] decided that contact with a vessel which had just been run down and sunk, is a "collision" within the meaning of the term. And contact with an anchor by which another vessel is moored comes also within the meaning of a collision with a "vessel."[4]

[1] (1893) VII. Asp. M.L.C., 395.
[2] (1880) *Richardson* v. *Burrows*, Q.B., Dec. 16.
[3] (1897) III. Com. Cas., 18.
[4] *Margetts* v. *Ocean Accident, etc., Corporation, Ltd.*, (1901) IX. Asp. M.L.C., 217.

CHAPTER VII

GENERAL AVERAGE

It must be clearly understood, and carefully borne in mind, that the right to General Average compensation and liability for General Average contribution are matters absolutely and entirely independent of marine insurance.[1] General Average formed part of the Rhodian law, and was in existence centuries before marine insurance was known at all.[2] In considering the subject of General Average, therefore, it is necessary for the present to dismiss from our minds altogether the question of marine insurance.

Definition

The Marine Insurance Act[3] provides as follows, *viz.*—

> A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.
>
> There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.

[1] Per Barnes, J., in *The Brigella*, (1893) VII. Asp. M.L.C. at p. 405.
[2] Per Lord Blackburn in *Aitchison* v. *Lohre*, (1879) IV. Asp. M.L.C. at p. 169.
[3] § 66 (1) (2) (3), p. 185 *infra*.

Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested, and such contribution is called a general average contribution.

The losses which give rise to general average contribution come, as above stated, under two heads—

i. Sacrifices of property.
ii. Expenditure.

Before proceeding to consider these subjects, it will be well to emphasise the

Essential Features

which must be present in order to give rise to general average contribution.

First of all, the common adventure must be in peril.[1]

Secondly: the sacrifice must be voluntary, or, in other words, it must be the intentional act on the part of man as opposed to an accidental loss by maritime peril.

Thirdly: it must be reasonably made. If it is a case of sacrifice, then it must be an act done prudently. If it is expenditure, then it must be fair and reasonable, and it is only allowable in general average so far as these essentials are complied with.

Fourthly: it must be extraordinary in its nature, and not one which is necessarily involved in performance of the contract of affreightment.

Fifthly: the object of the sacrifice or expenditure must be nothing other, or less than, the preservation of the property imperilled in the common adventure: it must

[1] *The Rodney. S.S. Trafalgar Co.* v. *British and Foreign Marine Insurance Co., Ltd.—Shipping Gazette*, 18/11.04. Cf. *Hamel* v. *P. & O. S.N. Co.*, (1908) XIII. Com. Cas. 270; XI. Asp. M.L.C., 71.

not be for the safety of the ship alone, or of the cargo alone, nor merely for the completion of the adventure.

This last-mentioned feature differs, apparently, from the laws of most foreign countries, which recognise either the "completion of the adventure," or else the "general benefit," as being the object which justifies a general average act.

Sixthly: the loss must be the direct result, or reasonably the consequence of, a general average act. For instance, in the case of jettison, if water gets into the hold during the act of jettison, the damage caused to cargo by the water is allowable in general average equally with the value of the cargo jettisoned, the reason being that the risk of incurring such damage, or the likelihood of its happening, would have been present in the minds of those who resolved to make the primary sacrifice.[1]

In the words of the late Richard Lowndes, in his renowned treatise on *The Law of General Average*—"Since giving must always imply an intention to give, what we have to here ascertain must be, what loss at once has in fact occurred, and likewise must be regarded as the natural and reasonable result of the act of sacrifice? or, in other words, what the shipmaster would naturally, or might reasonably, have intended to give for all when he resolved upon the act? If, then, upon the act of sacrifice any loss ensues which the master did not in fact bring before his mind at the time of making the sacrifice, it would have to be considered whether it were such a loss as he naturally might, or reasonably ought, to have taken account of." [2]

[1] Cf. also *Anglo-Argentine Live Stock Agency* v. *Temperley*, (1899) IV. Com. Cas., 281; VIII. Asp. M.L.C., 595.

[2] V. Ed. p. 41.

SACRIFICES

Sacrifices of Ship

In considering sacrifices of ship's materials, it is always necessary to carefully bear in mind that no loss or damage to the vessel or her appurtenances, arising from employment in the ordinary and intended manner, is allowable in general average, even though the employment be excessive.[1] If, however, in time of peril the master voluntarily destroys any part of the ship, or puts any of her appurtenances or appliances to a use for which they were not intended, at the risk of destroying or injuring them, any loss or damage thus caused for the common safety is to be made good by general contribution; as for example, using a sail in connexion with stopping a leak, or to cover up hatches broken by shipping a sea during a storm. As examples of sacrifices of ship, may be instanced the cutting away of masts, spars and sails, when a vessel is on her beam ends in order to right her; damage to a steamer's propeller and shafting, owing to the working of her engines whilst aground in a position of peril; coals consumed whilst the engines are being so worked;[2] the scuttling of a vessel in order to admit water to extinguish a fire; and so forth.

Amount to be Made Good (Ship)

The amount to be made good in general average in respect of sacrifice of any part of the vessel, or her machinery, is measured by the reasonable cost of repairs, less (if any) the usual deductions "new for old."[3] If, in any exceptional case, repairs have not been effected when

[1] Cf. *Wilson* v. *Bank of Victoria*, (1867) L.R. 2 Q.B., 203; *Harrison* v. *Bank of Australia*, (1872) I. Asp. M.L.C., 198; *Covington* v. *Roberts*, (1806) 2 B. & P. (N.R.), 378.

[2] *The Bona*, (1895) VII. Asp. M.L.C., 557.

[3] See Rule of Practice of the Association of Average Adjusters, p. 221 *infra*.

the adjustment is prepared, the amount allowed in general average is necessarily based on estimate.

So far we have been dealing with what are known as "sacrifices of ship," which have not been complicated by other considerations. But let us now consider the case where particular average damage is followed by a general average sacrifice, resulting conjointly in the condemnation of the vessel. Suppose, for example, a vessel meets with violent weather whereby she is very seriously damaged; subsequently, she gets into another storm, and, whilst on her beam ends, the master cuts away her masts and gear in order to right her. On her arrival at a port of refuge she is condemned and sold. In such circumstances, how is the amount to be allowed in general average to be arrived at? This question came before the Courts in the case of *Henderson* v. *Shankland*,[1] and it was decided that the method to be adopted is to deduct from the value of the vessel the estimated cost of repairing the particular average damage. This would give the value of the vessel immediately preceding the general average sacrifice, and the difference between that value and the sum realised by the sale is the amount of the general average sacrifice.

An example, with imaginary figures, will doubtless be of assistance in elucidating the foregoing—

Suppose the sound value of the vessel to be	£10,000
Deduct estimated cost of repairing particular average damage	7,500
Value of vessel immediately preceding general average sacrifice . . .	£2,500
Amount realised by sale of vessel . .	200
Amount to be made good in general average in respect of sacrifices	£2,300

[1] (1896) I. Com. Cas., 333.

Sacrifices of Cargo and Freight

Jettison provides one of the simplest forms of general average sacrifice. Jettison is the throwing overboard of cargo, or the cutting or casting away of masts, spars, rigging, or sails, for the purpose of lightening or relieving the ship in case of peril. But in speaking of jettison is ordinarily understood the throwing overboard of part of the cargo. The first reported case concerning jettison is Mouse's case [1] in the reign of James I. In that case certain jettisons had been made by passengers on a ferry-boat in time of danger in order to save their lives, and this was held to be a lawful jettison, inasmuch as the ferry-boat had not been overladen and the loss had not been caused by any fault of the ferryman.

With regard to cargo carried on deck, if it is jettisoned, the loss is made good by contribution when there is a general custom of trade (*e. g.* the timber trade) to carry such cargo on deck. In the absence of any such custom, if the deck-load is carried merely by agreement between the shipper and the shipowner, a jettison of it gives no right of contribution against other shippers unless they have specially agreed to be liable to contribute: and the liability of the shipowner to contribute depends on the terms of the contract under which the jettisoned deck-load is carried.

Damage by water used to extinguish a fire is allowed in general average.[2] But if the package damaged by the water was itself on fire when the water was poured upon it, no allowance in general average is to be made.[3] For

[1] 12 Coke R., 63.

[2] *Whitecross Wire Co.* v. *Savill*, (1882) IV. Asp. M.L.C., 531.

[3] As to bulk cargoes, *e. g.* coal, cf. *Greenshields* v. *Thomas Stephens & Sons*: *The Knight of the Garter*, (1908) XIV. Com. Cas., 41, XI. Asp. M.L.C., 167.

this reason great care has to be taken in surveying cargo which has been landed from a vessel on which a fire has occurred to differentiate between fire damage and exclusively water damage.

Among other general average sacrifices of cargo which give rise to contribution may be mentioned cargo burnt for fuel when the coal supply has run short, always provided, however, that the original supply was sufficient.

When a sacrifice of cargo (*e.g.* by jettison) also involves a loss of freight, it follows that the freight so sacrificed is likewise made good in general average.

Amount to be Made Good (Cargo)

It has next to be considered how the amount to be made good in general average for sacrifice of cargo is to be computed. In the event of goods having been jettisoned, or otherwise sacrificed, the amount to be allowed in general average is the net value which they would have had on the day of discharge at the port where the adventure terminates, deducting therefrom those charges which would have been incurred had the goods arrived instead of having been sacrificed, *e. g.* freight (if not advanced, or prepaid), discount, duty, landing and sale charges. If, however, the goods remaining on the vessel arrive at the port of destination in a damaged condition, owing to causes which would have equally affected the jettisoned goods had they remained on board instead of having been thrown overboard, the allowance in general average is to be based on what the goods jettisoned would presumably have realised had they arrived at destination damaged to the same extent as the other cargo.[1] In the case of damage to goods,

[1] *Fletcher* v. *Alexander*, (1868) L.R. 3 C.P. 375.

the amount of loss to be made good is ascertained by a comparison of their net proceeds with what they would have produced net had they been sound. And if the goods are subject to leakage in the ordinary way, such as casks of oil or wine, the ordinary leakage must be deducted in ascertaining the value to be admitted for general average contribution. The same remark equally applies to ordinary deficiency, or breakages.

Amount to be Made Good (Freight)

With regard to the amount to be allowed in general average in respect of a sacrifice of freight at the risk of the shipowner—the amount of prepaid, or advanced freight, becomes merged in the value of the goods—it is the gross freight which would have been earned had not the goods been sacrificed, less those charges which would have been incurred by the shipowner to earn such freight, but which he has, in consequence of the sacrifice, not incurred. If, after the sacrifice, any substituted cargo has been shipped on the same voyage at a port of call to fill the place of that jettisoned, any freight which may be earned in respect of that substituted cargo, less the expenses incidental to earning it, must be credited to the freight which has been sacrificed.

EXPENDITURE

All extraordinary expenditure properly incurred in time of peril for the joint preservation of the common adventure is the subject of general average contribution.

One of the most frequent cases of general average expenditure is where a vessel puts into a port of refuge for the common safety, incurring inward port charges, pilotage, harbour dues, etc. It may be also found

necessary to discharge the cargo to effect repairs, and then there would be the expenses of reloading the cargo and of leaving the port of refuge to resume the voyage. Possibly, also, shore-labour may have to be engaged to work the pumps if the ship be leaking.

Now there may be two reasons which necessitate putting into a port of refuge: one reason may be on account of general average sacrifice, *e g.* breakage of propeller blades and damage to machinery caused by working engines to refloat a stranded steamer; or masts cut away to right a ship. The other reason may be on account of particular average damage, *e.g.* propeller blades broken, or the breakage of a shaft, through the propeller coming in contact with floating wreckage, or the like; or the dismasting of a vessel in a gale. And it is essential to ascertain which reason necessitated the putting into port, as this furnishes the test as to how the expenditure is to be treated according to the law of England, each case having to be dealt with on its merits.

According to English law, if a vessel puts into a port of refuge in consequence of damage which is the subject of general average, the cost of entering the port of refuge; of discharging the cargo for repairs, if necessary; of warehousing the cargo whilst repairs are being effected; of reloading the cargo; and of leaving the port are all treated as general average, because all this expenditure is the consequence of a general average act.[1]

If, however, the reason for putting into port for the common safety is consequent on particular average damage then, according to English law, the cost of entering the port and, if necessary, of discharging the cargo in order to effect repairs, is general average, and here general average

[1] *Attwood* v. *Sellar*, (1880) IV. Asp. M.L.C., 283.

ceases, inasmuch as physical safety has been attained. Consequently, the warehouse rent of the cargo is a particular charge on the cargo; and the cost of reloading and outward port charges are a particular charge on freight.[1]

These distinctions, which may seem rather subtle, are, as has been particularly mentioned, according to the law of England. The York-Antwerp Rules (*vide* p. 236 *infra*) and the laws of most foreign countries recognise no such distinction, and they treat the whole expense as general average irrespective of the cause or motive which necessitated the putting into the port of refuge. This divergence arises in consequence of the difference between English and Continental laws as to the object which prompted the general average act, English law recognising, as has already been pointed out, "the attainment of safety," whereas Continental laws recognise "completion of the adventure," or "general benefit."

Where assistance is engaged by the master for the safety of ship and cargo, the amount paid for such assistance is likewise the subject of general average contribution. For instance, if a steamer breaks her shaft and the master engages a tug or another steamer to tow her to port, the amount paid for such towage is treated as general average.

Complex Salvage Operations

Suppose a ship with her cargo has been stranded, and has been brought into safety by a series of connected, though distinct, operations; for example, the first operation being discharging and landing the cargo, the second being attempts to tow the vessel off the strand, which, in the event of failure, is followed by the third operation of digging out a channel to facilitate the re-floating. In

[1] *Svendsen* v. *Wallace*, (1885) V. Asp. M.L.C., 453. See Rule of Practice of the Association of Average Adjusters, p. 217 *infra*.

such circumstances the question arises, How is it to be determined whether the entire cost of those operations, from their commencement to their termination, should be treated as general average, or whether it should be charged specifically to the property saved by each specific stage in the operations? The answer to this question is obtained, to use an Irishism, by putting a further question, What was the principal motive which, from the facts, may be reasonably presumed to have induced the incurring of the expenditure? If that motive was to save the cargo alone, as opposed to the ship alone, or *vice versâ*, then the expense must fall on the cargo or the ship as the case may be. But if the principal motive of the expenditure was the joint preservation of the ship and cargo, then the expenditure is to be allowed in general average.[1]

For example, in a case where specie had been safely landed from a stranded vessel, and after it had been so landed, cargo was jettisoned, and tugs employed to tow the vessel off, it was decided that the specie was not liable to contribute either to the jettison or to the expenses of re-floating the vessel as they were not incurred for the safety of the specie.[2] On the other hand, it has been held that the cost of discharging cargo and getting a ship off a bank were all general average when they formed part of what must be deemed one continuous operation for the benefit of ship, freight and cargo.[3] There is one very important limitation to the liability of cargo for contribution to general average in cases of complex salvage operations, which was laid down in the case of *Kemp* v. *Halliday*.[4]

[1] Cf. *Job* v. *Langton*, (1856) 6 E. & B., 779; *Moran* v. *Jones*, (1857) 7 E. & B., 523; and *Walthew* v. *Mavrojani*, (1870) L.R.S. Ex., 116.

[2] *Royal Mail Steamship Co.* v. *English Bank of Rio de Janeiro*, (1887) 19 Q.B.D., 162.

[3] *Moran* v. *Jones*, (1857) 7 E. & B., 523.

[4] (1865) L.R. 1 Q.B., 520.

That case decides that when a ship with her cargo on board has been sunk, if the cargo can be more easily and cheaply saved by itself than conjointly with the ship, the cargo cannot be required to pay, as its share of contribution towards a conjoint salvage, a larger share than would have been the cost of saving it separately.[1] Specie, for example, in a vessel which has been sunk, might provide an instance where this principle would be applied. It might happen that the specie could be saved by incurring little expense, whereas the saving of the ship and cargo jointly would be a costly operation. In such circumstances the limit of the liability of the specie would be the cost of saving it by itself.

There can be no question as to the amount to be allowed in general average in the case of general average expenditure: it is the amount of the expenditure itself.

Substituted Expenses

When a vessel is at a port of refuge in a damaged condition, it may be possible, by adopting an alternative course, to avoid the expense which would be entailed by repairing her there. For instance, suppose a vessel is at a port of refuge where, in order to repair her, it would be necessary to discharge the whole of her cargo, warehouse it, and subsequently reload it. It might be possible, as an alternative course, to tow her to her port of destination for a quarter the sum which the operations of discharging, warehousing and reloading the cargo would entail. In these circumstances the alternative course would be prudently and rightly adopted, and would be called a "substituted expense," and would be apportioned, up to the amount of expense saved, in the

[1] Lowndes' Law of General Average, V. Ed. p. 187.

same ratio as the expenditure in connexion with the more expensive course would have had to have been borne had it been incurred. This, however, in the absence of judicial authority, has to be a matter of special agreement between the parties: but from an equitable point of view the proposition seems unassailable. As an example, for the sake of clearly elucidating the principle, let us take an imaginary and rare case of a vessel putting into a port of refuge for repairs in consequence of particular average damage, the adjustment to be governed solely by British law—

Suppose that the inward port charges and the cost of discharging the cargo to repair the ship, which would be general average, would amount to, say . . .	£500
The warehouse rent of the cargo during the effecting of repairs to the vessel which in the circumstances, would form a special charge on the cargo, would amount to, say	200
And the cost of reloading the cargo and the outward port charges which, in the circumstances, would be a special charge on freight, would amount to, say	500
The expenditure necessitated at the port of refuge (exclusive of the cost of repairs to the vessel) would consequently be	£1,200

But suppose instead of incurring this expense at the port of refuge the vessel could be towed to her port of destination for the sum of only £240, or one-fifth of the expense which would be entailed by repairing at the port

of refuge, and that this cheaper method was rightly and prudently adopted, the £240 would be apportioned in the same ratio as the greater expense of £1,200, thus—

			Substituted Expenses
General average	£500	will bear	£100
Cargo (special charge)	£200	,,	40
Freight ,,	£500	,,	100
	£1,200	Total	£240

Of course, if the expenditure which is avoided would have been wholly treated as general average, the substituted saving would be similarly dealt with.

In order to justify the incurring of a substituted expense, it is necessary to show (i) that its adoption has led to a saving of expense, and (ii) that it was not an expense devolving upon the shipowner by reason of his obligations under the contract of affreightment.

Raising Funds

The incurring of expenditure at a port of refuge entails, of course, the advancing of funds to meet it, and, provided that proper and necessary steps have been taken to make a collection "on account," only the actual out-of-pocket expenses which have been reasonably incurred for interest and for commission for advancing funds are allowable in average.[1]

One seldom hears now-a-days of a forced sale of cargo, or even loans on bottomry or respondentia, in order to provide funds, as the cable usually enables such provision to be arranged, but, for completeness, these subjects may he briefly referred to.

Forced Sale of Cargo

With regard to a forced sale of cargo in order to raise funds, it should, first of all, be remembered that if the

[1] Rule of Practice of the Association of Average Adjusters, p. 213 *infra*.

master could have obtained money by any other means, he has no right to resort to sale. Suppose, however, that cargo has been properly and rightly sold at a port of refuge, and it realises more than the net value which it would have realised had it been brought on to destination instead of being sold. In such circumstances, the owner of the goods is entitled to the actual proceeds at the port of refuge.[1] But, conversely, if the goods realise less than they would have fetched at destination, then the owner of the goods is entitled to their net value as if they had arrived at destination.[2] He is entitled to any profit and is not to suffer any loss.

Bottomry and Respondentia

Now-a-days the necessity for raising funds by resorting to Bottomry and Respondentia very rarely arises. For the sake of completeness, however, it may be explained that "bottomry" is a monetary loan obtained, in cases of urgent necessity, on the security (practically a "pawning") of the ship or ship and cargo jointly; and "respondentia" is a loan similarly obtained on the security of the cargo alone, the sums so advanced being repayable to the lender a certain agreed number of days after arrival of the vessel, as specified in the formal document called a "bottomry" or a "respondentia" bond. If the vessel be lost before arrival at destination, the lender loses his money, as it is only payable on condition that the ship and/or cargo arrive. The right to raise money on respondentia is only justified when all other means of obtaining it, except that of selling the cargo, have been exhausted.

[1] *Richardson* v. *Nourse*, (1819) 3 B. and Ald., 237.
[2] Cf. *Hopper* v. *Burness*, (1876) III. Asp. M.L.C., 149

LOSSES AND EXPENDITURES NOT ADMISSIBLE IN GENERAL AVERAGE

Hitherto we have been considering sacrifices and expenses which are properly admissible in general average. There are, however, certain losses which, according to English law, do not give rise to general average contribution. These may now be briefly noticed.

Firstly: No allowance is to be made if the peril which necessitates the sacrifice or expenditure is attributable to the fault of the shipowner, unless he is protected in regard to such fault by the terms of the contract of affreightment. For example, a shipowner cannot claim contribution to sacrifice or expenditure which has arisen in consequence of a vessel's unseaworthiness at the commencement of the voyage,[1] neither can he claim contribution to sacrifice or expenditure which is the result of negligence of the master or crew unless he has exempted himself from liability for such negligence by the terms of the contract of carriage.[2]

Secondly: No contribution is due if the loss or expense is one which devolves upon the shipowner by reason of his obligations under the contract of affreightment, although the loss or expenditure has been enhanced by reason of the peril which threatened the joint adventure.

Examples of this latter proposition are wages and maintenance of crew at a port of refuge while effecting repairs; coals consumed whilst bearing up for a port of refuge; coals used whilst working a donkey-engine to pump a leaky ship;[3] loss by press of sail in keeping off a lee shore or in escaping an enemy, etc.

[1] *Fawcus* v. *Sarsfield*, (1856) 6 E. & B., 192.
[2] *The Carron Park*, (1890) VI. Asp. M.L.C., 543.
[3] *Harrison* v. *Bank of Australasia*, (1872) I. Asp. M. L. C., 198.

Thirdly: No allowance for loss of cargo is made if the loss is attributable to the wrongful act of the shippers of the cargo. For instance, if hemp is wrongfully shipped in a damp and dangerous state, and heats in consequence (called *vice-propre*), and it becomes necessary, therefore, to jettison it for fear of fire; the loss by jettison is, in such circumstances, not allowable in general average.

Fourthly: No allowance is to be made where no actual loss has been sustained in consequence of the sacrifice. The leading case in this connexion is that of *Shepherd* v. *Kottgen*,[1] where a mast was cut away, but the mast, prior to the cutting away, had been reduced to such a condition of wreck by perils of the sea that it would inevitably have been lost. It was decided in that case that the cutting away of this mast was not allowable in general average. The mast was already in fact lost, and the cutting away of it, therefore, involved no sacrifice. Other instances in this connexion are the slipping of an anchor because it is so fixed to the rocky bottom that it could never be raised; or loss occasioned by water poured upon burning goods if the goods themselves be on fire (*vide* p. 102 *supra*), the goods being in such case really benefited, as the water damage has saved them from total destruction by fire; or loss of freight in consequence of cargo being sold at a port of refuge in consequence of its being so heated that it could not be carried on to its destination.[2]

Fifthly, and lastly: No allowance is to be made if the loss or expense is not a direct consequence of a general average act. For example, destruction of cargo by fire at a port of refuge after the cargo has been discharged

[1] (1877) III. Asp M.L.C., 544.

[2] *Iredale* v. *China Traders' Insurance Co.*, (1900) V. Com. Cas. 337; IX. Asp. M.L.C., 119.

and placed in safety. Loss in consequence of the voyage being delayed by reason of a general average act is also not admissible.[1]

TIME AND PLACE OF, AND LAW GOVERNING THE ADJUSTMENT

Having considered the losses and expenditures which give rise to general average contribution, the next point to be noticed is that the proper time for the adjustment or ascertainment of the contributions due is the termination of the voyage, and the law which governs the adjustment is, in the absence of any stipulation to the contrary in the contract of affreightment, the law of the port of destination. But if the voyage has been broken up at an intermediate port, then the adjustment must be drawn up, subject to any provision to the contrary, in accordance with the law of that port, and on the state of facts as there existing. It may here be mentioned that the shipowner's claim for contribution is capable of enforcement against the cargo, as such, and it is, therefore, customary to require the signature of an Average Bond[2] before delivering up the cargo in order to determine who is to be looked to for payment of the contribution.

PREPARATION OF ADJUSTMENT. LIENS

It is the duty of the shipowner to arrange for the preparation of the adjustment, and he invariably, and wisely, entrusts this work to a professional Average Adjuster. According to English law, the selection of the Adjuster to be employed is a matter which rests entirely with the shipowner.[3] It is not necessary, moreover, that

[1] *The Leitrim*, (1902) VIII. Com. Cas., 6 ; IX. Asp. M.L.C., 317.

[2] See p. 115 *infra*.

[3] *Wavertree Sailing Ship Co.* v. *Love*, (1897) VIII. Asp. M.L.C., 276.

the Adjuster should be practising at the port where the adventure terminates. As has just been remarked, the selection of the Adjuster is entirely the affair of the shipowner. The shipowner has a lien on the cargo for the contributions which are due in respect of general average, *i. e.* he is entitled to hold the goods until security is given. In trifling cases he is usually content if consignees of cargo sign what is called an Average Bond, a document whereby it is agreed that if the shipowner delivers to the consignees their cargo, they will, on their part, pay such amount of general average contribution as may be found properly due from them, and will furnish him, when required, with full information as to the value of their cargo so that the amount of contribution may be accurately assessed. If the general average is of considerable amount, the shipowner, in addition to the Bond, usually enforces his lien by collecting a General Average Deposit, which should be paid into a bank in the name of two trustees, one appointed by the shipowner and one by the consignees of cargo,[1] in exchange for a Deposit Receipt in the usual recognised form. General Average Deposits are refunded by underwriters in exchange for the original Deposit Receipts, provided, of course, that the estimated contributory value does not exceed the insured value, in which case only a proportionate part of the amount deposited would be recoverable. The original Deposit Receipt is retained by the underwriter, in order that he may prove his title to any refund which may eventually be found to be due.

Some of the leading steamship companies have shown a willingness to accept in certain cases the guarantee of underwriters for payment of general average contribution instead of insisting on a cash payment by consignees, and

[1] *Huth* v. *Lamport*, (1886) V. Asp. M.L.C., 593.

apparently the convenience afforded by the adoption, when practicable, of this procedure is now recognised by shipowners generally.

CONTRIBUTING INTERESTS AND VALUES

Having considered the values to be made good in respect of sacrifices, the next question is: What are the contributing interests, and what value is to be placed upon them for the purposes of assessment of contribution?

The interests which contribute to general average are those which have been saved from destruction on the common adventure by the general average act. They are usually the Ship, the Freight and the Cargo. If, however, the vessel has no cargo on board, and is proceeding in ballast to her loading port under charter, the contributing interests are the vessel and the freight under the charter. For example, suppose a vessel leaving Liverpool in ballast is chartered, or hired, to go to Savannah to load a cargo of cotton for conveyance to the United Kingdom, and whilst proceeding to Savannah with no cargo on board a general average sacrifice is made, the contributories to the sacrifice are the ship and the chartered freight, or, in other words, the amount payable under the charter for the hire of the vessel.[1]

The proposition involved in the judgment in the *Brigella*[2] case, that if all the contributing interests belonged to the same person there could be no general average contribution, was overruled by the Court of

[1] *The Yestor: Carisbrook S.S. Co.* v. *London and Provincial Marine Insurance Co., Ltd.*, (1902) VII. Com. Cas., 235.

[2] (1893) VII. Asp. M.L.C., 403.

Appeal in the case of the *Airlie*,[1] and the Marine Insurance Act, giving effect to the latter decision, provides that where ship, freight, and cargo, or any two of those interests, are owned by the same assured, the liability of the insurer in respect of general average losses or contributions is to be determined as if those subjects were owned by different persons.[2]

It may be well here to mention that the personal effects of the master and crew, stores, and the wearing apparel, jewellery and usually baggage of passengers do not ordinarily, presumably on the score of general convenience, contribute to general average.[3]

Firstly, then: The Ship contributes on her value as saved by the sacrifice, *i. e.* her worth to the owner in the actual condition in which she is on arrival at the port of destination, or, if the voyage is broken up and the ship and cargo part company at an intermediate port, then it must be her value at the intermediate port.

Secondly: The freight contributes on the net amount of freight saved by the sacrifice, *i. e.* the amount of freight at the risk of the shipowner, deducting therefrom such expenses of earning it, such as port charges and wages of crew, as would not have been incurred if the vessel had been lost at the time of the sacrifice. The contribution applying to freight at risk is borne by the shipowner, or by the freight underwriter if it is insured. Freight paid in advance is considered as an increased value of cargo, and the contribution attaching thereto is accordingly borne by the owners of cargo.

Thirdly: The Cargo contributes on its actual net arrived

[1] *The Airlie: Montgomery* v. *Indemnity Mutual Marine Insurance Co.*, (1902) VII. Com. Cas., 120. *Vide* also p. 120 *infra.*

[2] § 66 (7) *vide* p. 186 *infra.*

[3] *Vide* also Rule XVII. of York-Antwerp Rules, p. 242 *infra.*

value at the port of destination, after deduction of freight, if any, payable on delivery, and of such other expenses as must be borne by the owner of the cargo in the event of delivery and which he would escape in the event of total loss, such as landing charges, duty, brokerage, etc. Freight payable in advance is, as indicted on the previous page, not to be deducted, being considered as merged in the value of the cargo. If the voyage be broken up, then the cargo contributes on its net value at the port or place where the ship and cargo part company.

Amounts made Good contribute.

It is a fundamental principle of general average that in the event of there being a sacrifice, the owner of the property sacrificed shall neither benefit nor lose in consequence thereof; in fact, he must be placed in exactly the same position as if, instead of his goods, the goods of somebody else had been sacrificed. To secure this object the cargo sacrificed is, so far as contribution is concerned, regarded as not having been lost at all, and the value of it which is made good in general average is, therefore, brought in as a contributory to the general average. And this also, of course, equally applies to sacrifices of ship's materials and freight. For purposes of clearness a simple example may be given.

Suppose cargo of the value of £1,000 (including freight advanced) is jettisoned, and the value of the property—ship, freight and cargo—which the jettison has saved is £9,000. The amount to be made good in general average is, therefore, £1,000. But the contributories to that £1,000 would be not only the £9,000, the value of the property saved, but also the £1,000, the value of the cargo jettisoned and made good by contribution—total values, £10,000 to contribute to a loss of £1,000.

The property saved will therefore pay nine-tenths of the £1,000, or . . .	£900
The value of the property jettisoned and made good in general average will bear one-tenth of the £1,000, or	100
Total .	£1,000

Consequently, the owner of the cargo jettisoned will receive from the other contributories the sum of £900—the amount made good in general average, viz. £1,000, less the amount of contribution attaching thereto, viz. £100. If the amount made good in general average were paid in full without deducting any contribution at all, then the person whose property had been sacrificed would be better off than the person whose property had been saved, because he would recover his loss in full and escape any contribution. And this would be contrary to the principle that "in result no one is to be better off, nor yet worse off, than if, instead of his, some other party's property had been given for the sake of all." [1]

For purposes of clearness and illustration let us glance at a very simple example of an apportionment of general average expenditure in order to show the principle on which contribution is levied.

Expenditure, say, £305.

Ship valued at	£10,000	will pay in proportion .	£100
Cargo, net value,	20,000	,, ,, .	200
Freight, net amount,	500	,, ,, .	5
	£30,500		£305

[1] Lowndes' Law of General Average, V. Ed. p. 43.

APPLICATION TO INSURANCE

Having now considered general average, which, as mentioned at the outset, exists independently of marine insurance altogether, it is necessary to glance at its application to Insurance.

When a general average sacrifice has been made, the underwriter who has insured the property so sacrificed is directly liable to the assured for the insured value of that property,[1] and, on payment, he is entitled to general average compensation, less, of course, the amount of contribution attaching thereto (as previously explained, p. 118). The underwriter is likewise directly liable for general average damage irrespective of percentage,[2] the loss being, in the case of Cargo and Freight, assessed on the insured value, in the same manner as particular average: any question of insured value being disregarded in the case of Hull. In recovering a general average loss directly from underwriters, the assured must, however, give credit for the contributions attaching to any other interests vested in him, and which should contribute to the loss, he being deemed to have such contributions already in his own pocket, whether he be insured in respect of them or not. For example, if the vessel and the cargo both belong to the same person, in claiming direct on the underwriter on the vessel for general average sacrifice of ship's materials credit must be given for the cargo's proportion of contribution to such sacrifice.[3]

Let us next deal with the liability of an underwriter in

[1] *Dickinson* v. *Jardine*, (1868) L.R. 3 C.P., 639.

[2] *Price* v. *A1 Ships' Small Damage Insurance Association*, (1889) VI. Asp. M.L.C., 435.

[3] Cf. *The Airlie · Montgomery* v. *Indemnity Mutual Marine Insurance Co.*, (1902) VII. Com. Cas., 120. *Vide* Marine Insurance Act, § 66 (7), p. 186 *infra*.

respect of contribution to general average, as opposed to his liability for general average loss. In ascertaining the amount of liability for contribution, regard must be had to the insured value of the property. If the insured value is equal to, or if it exceeds, the contributing value. then the underwriter pays the whole of the amount of the general average contribution—no more and no less. But if the insured value is less than the contributory value, then the underwriter pays only the proportion of the contribution which the insured value bears to the contributory value, and this principle applies equally to Ship, Freight and Goods.

As an illustration, suppose goods with a contributing value of £1,000 have to pay general average contribution amounting to £100. If the insured value be £1,000, or £1,200, the underwriter pays the £100. But if the insured value be £900, then the underwriter is only liable for £90, or nine-tenths, this being the proportion which the insured value, viz. £900, bears to the contributory value, viz. £1,000.

Where there has been particular average depreciation for which the underwriter is liable, the amount of the claim for particular average must be deducted from the insured value of the goods in order to ascertain whether or not the underwriter is liable for the whole of the contribution attaching to the actual contributory values.

General Average Deposits [1] are also reimbursed by underwriters in exchange for original Deposit Receipts, but the foregoing remarks respecting insured and contributory values are equally applicable in regard thereto.

As was mentioned on p. 45, general average and salvage charges are not recoverable under the "Sue and Labour Clause." [2]

[1] *Vide* p. 115 *supra.*

[2] *Aitchison* v. *Lohre*, (1879) IV. Asp. M.L.C., 168. Marine Insurance Act, § 78 (2), p. 191 *infra.*

CHAPTER VIII

SALVAGE

SALVAGE is the reward under maritime law to a salvor for saving, or helping to save, property at sea, or property and life conjointly. Sometimes the word is used to designate the property which has been saved. But it is the former meaning which we will now consider—salvage as a reward for saving or succouring property which is in danger at sea. The salvor who has saved property has what is called a possessory lien on it for the reward of his services; and if the property be not actually in his possession, he has a so-called maritime lien, *i.e.* a claim which he can enforce by legal process in the Court of Admiralty.

It is necessary to notice that salvage is only awarded by the Court of Admiralty in the event of the saving of a ship or vessel and/or her cargo and/or freight either wholly or partially. A large floating gas-buoy, for example, was held not to be a ship or vessel, and was therefore not the subject-matter of salvage within the jurisdiction of the High Court of Admiralty.[1]

The salvage services must have been of material assistance in salving the vessel. No salvage will be awarded if the attempts of the salvors were of no avail or benefit. Moreover, the services must have been rendered by third parties, *i.e.* persons who are strangers

[1] *Gas Float Whitton No.* 2, (1897) VIII. Asp. M.L.C., 272.

to the adventure. The officers and crew of a vessel cannot ordinarily claim salvage for helping to save their ship and cargo from danger, as this forms part of their duty as servants of the shipowner.

It does not always happen that the reward for salvage services is capable of amicable settlement, or of a special agreement between the salvors and the owners of property salved. And so one finds many cases brought before the Court of Admiralty for decision as to what remuneration is due to the salvors. After full consideration of all the circumstances in connexion with the salvage services rendered, the Court awards to the salvors the remuneration to which it considers they are entitled, this being called a Salvage Award.

Salvage, recoverable under maritime law by a salvor independently of contract[1] should be apportioned over the values on which it was assessed. And in recovering from underwriters, where the insured value is less than the contributory value, the amount recoverable is reduced in proportion, in exactly the same manner as in dealing with general average contribution. Any difference of opinion on this point was finally set at rest by the decision in the case of *Balmoral Steamship Co.* v. *Marten*,[2] in which the House of Lords laid down the principle just mentioned. In that case a vessel was valued in the policy at, and was insured for, £33,000. Salvage services were rendered to her, and a salvage award was made by the Admiralty Court, the amount being based on a valuation of £40,000. It was decided that the underwriters were only liable for $\frac{33}{40}$ths of the amount so awarded.

In the event of the salvage services having been occasioned in consequence of unseaworthiness of the

[1] Marine Insurance Act, § 65 (2) p. 185 *infra*.

[2] (1902) VII. Com. Cas., 292.

vessel, the underwriter on the hull of the vessel is not liable for any portion of the remuneration awarded to the salvors by the Court of Admiralty. For example, a vessel, insured under a "time" policy, put to sea with an insufficient coal supply, and in consequence had to obtain assistance, in respect of which the salvors obtained a salvage award in the Admiralty Court. In an action by the shipowners against an underwriter on hull to recover salvage so awarded, it was held by the Court of Appeal that the salvage charges were not rendered necessary by a peril of the sea, but by the inherent unfitness of the steamer, and that therefore the underwriter was not liable.[1]

Certain provisions regarding salvage have been embodied in the Maritime Conventions Act, 1911, as set forth in Appendix C.[2]

[1] *Ballantyne and Co.* v. *Mackinnon*, (1896) I. Com Cas., 424.
[2] *Vide* p. 206 *infra*.

CHAPTER IX

SUBROGATION

SUBROGATION is the right by which an underwriter, on his settling a loss, is enabled to place himself in the position of the assured, to the extent of acquiring all rights and remedies in respect to the said loss which the assured may have possessed, either in the nature of proceedings for compensation or recovery in the name of the assured against third parties, or in obtaining general average contribution thereto.

The following are the provisions of the Marine Insurance Act in this connexion—

> § 79. i. Where the insurer pays for a total loss, either of the whole, or in the case of goods, of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss.
>
> ii. Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the

casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss.

As examples of this right of subrogation may be instanced the following, viz.—

Suppose a ship is posted at Lloyd's as "missing" and the underwriter on her hull pays a total loss. If the vessel should subsequently arrive, she is then the property of the underwriter.[1]

Or, suppose goods are jettisoned for the general safety. The underwriter, on paying for a total loss of the jettisoned goods, stands in the place of the assured, and is entitled to general average compensation for the jettison.[2]

To put another example: Suppose a vessel being valued at, and insured for £6,000, though her real value was £9,000. Owing to a collision she was sunk, and the underwriters paid a total loss of £6,000. In due course, the assured recovered from the wrongdoing vessel a sum of about £5,700. The assured contended that they were entitled to retain one-third of this sum (the vessel's actual value being £9,000, and the insured value being £6,000), but it was decided that the underwriters were entitled to the whole of this £5,700, £6,000 being the value admitted in the policy.[3]

It must always be remembered that the rights and remedies to which the underwriter is subrogated are only those which the assured himself would be able to exercise. As an instance of this, suppose two ships, belonging to one and the same owner, came into collision.

[1] *Houstman* v. *Thornton*, (1816) Holt, N.P., 242.

[2] *Dickinson* v. *Jardine*, (1868) L.R. 3 C.P., 639.

[3] *North of England Insurance Association* v. *Armstrong*. Cf. the *Grand Traverse* (American case)—*Shipping Gazette*, 16/6/03.

The underwriter on the ship not in fault, on paying for the damage occasioned to the vessel insured under his policy, would have no claim against the wrongdoing vessel, on the ground that, as both vessels were owned by one and the same person, no remedy had been transferred to the underwriter, inasmuch as a person cannot sue himself.[1] For this reason the following clause is usually inserted in policies on hulls of vessels, viz —

> *Should the vessel hereby insured come into collision with or receive salvage services from another vessel belonging wholly or in part to the same owners, or under the same management, the assured shall have the same rights under this policy as they would have were the other vessel entirely the property of owners not interested in the vessel hereby insured; but in such cases the liability for the collision, or the amount payable for services rendered, shall be referred to a sole arbitrator to be agreed upon between the underwriters and the assured.*

[1] *Simpson* v. *Thompson*, (1877) III. Asp. M.L.C., 567.

CHAPTER X

EXPRESSED WARRANTIES

An expressed warranty, contrasted with an implied warranty, is a condition of the contract which is expressed and set forth in the policy, and a strict compliance with any warranty so expressed is absolutely essential; otherwise the contract is invalid. And it does not avail the assured if, in a given case, the particular breach has had no relation whatever to a loss which has occurred; this is beside the question.

Warranted "To Sail"

One of the expressed warranties most constantly met with is a warranty to the effect that a vessel shall sail on or before a certain date. A question may then arise as to what constitutes a sailing within the meaning of such a warranty. It is not necessary in order to satisfy the warranty that the vessel shall have actually quitted her port of departure. It will be sufficient if the vessel has started on her voyage with everything ready for its prosecution, and able to leave port if not prevented by some accident. But if anything is wanting in order to enable her to proceed on her voyage, such as a full complement of crew, or a clearance at the custom house, and it is necessary in consequence to stop for these, the mere "breaking of ground" will not satisfy the warranty. The test is whether there was a clear intention on the part of the master, when the vessel left her moorings, to proceed directly on the voyage. The motive of moving

the vessel from her moorings must be looked to, and that motive supplies the test whether or not the warranty has been complied with.[1]

A warranty "to sail *from*" a specified port on a certain date will not have been complied with unless the vessel has actually left the precincts of the port named. This warranty is absolute. If the ship is ready to leave port and is prevented by bad weather or accident, this is beside the question. If she has not quitted the port by the date specified, the policy is void by reason of the breach of warranty.

Warranted "no Iron or Ore"

Another warranty in common use is—"Warranted no iron or ore in excess of registered tonnage." With regard to this warranty, the Court of Appeal has held that the word "iron" includes "steel," and that the shipping of a quantity of "steel" in excess of the net registered tonnage of the vessel avoided the policy.[2]

This decision shows that a warranty binds the Assured not merely to a verbal fulfilment, but to the full commercial import of the words used therein.

Warranted "Part Value Uninsured"

Another warranty frequently met with in insurances on hulls of vessels is a warranty that a certain sum, or so much per cent., of the insured value shall be uninsured, *i. e.* that the owner shall, in effect, be his own underwriter for the specified sum or percentage. And in some instances the willingness of a shipowner to run part of the risk himself is an element not unfavourably

[1] *Sea Insurance Co.* v. *Blogg*, (1898) III. Com. Cas., 218.

[2] *Hart* v. *Standard Marine Insurance Co.*, (1889) VI. Asp. M.L.C., 368.

regarded by the underwriters, as the shipowner is then pecuniarily concerned in the event of loss or damage occurring.

An interesting decision in connexion with the warranty now under consideration arose in the case of the *General Insurance Co. of Trieste* v. *Cory*.[1] In that case a shipowner valued his vessel for insurance at £12,000 and insured her for £9,600, warranting that in respect of the remaining £2,400 he would remain uninsured, or, in other words, be his own underwriter. He subsequently heard rumours that some of the underwriters on the £9,600 policy were likely to become insolvent, so, like a prudent man, he effected further insurances to cover the probable deficiency which might arise in the event of loss in consequence of some of the original underwriters being unable to meet their liabilities. Mr. Justice Mathew held that, in such circumstances, the effecting of the further insurances by the shipowner was not a breach of the warranty.

There are, in the matter of "expressed" warranties, other warranties of endless variety, both as regards stipulations and wording, but space will not permit reference to them in this handbook.

The "Free of Capture and Seizure" Clause and the "Memorandum" are, of course, two of the best-known expressed warranties, but these have already been explained (*vide* pp. 48 and 86 *supra*). The "F.P.A." warranty is dealt with in the following chapter.

It should be carefully borne in mind, as has already been stated, that the terms of all "expressed" warranties must be strictly and accurately complied with, equally with the implied warranties. The latter have been dealt with in Chapter I. (*vide* p. 5 *et seq.*, *supra*.

[1] (1897) II. Com. Cas., 58).

CHAPTER XI

SUNDRY CLAUSES IN GENERAL USE

With regard to clauses which are attached to policies of marine insurance for the purpose of giving effect to the exact intention of the parties, their variety was at one time almost endless, but of recent years this inconvenience has been mitigated by the introduction, and general adoption, of a recognised form for the clauses in common use.[1] It is proposed, however, only to deal with those familiar clauses which are in daily use in the marine insurance world.

"F.P.A." Clause

A clause, used almost every hour, is known as the F.P.A. (*i.e.* free of particular average) clause, and it is in effect, an application, or extended application of, the Memorandum.

It reads as follows, viz.—

> "*Warranted free from particular average unless the vessel or craft be stranded, sunk, or burnt, each craft or lighter being deemed a separate insurance. Underwriters, notwithstanding this warranty, to pay for any damage or loss caused by collision with any other ship or craft, and any special charges for warehouse*

[1] See "Time" clauses adopted by the Institute of London Underwriters. Also clauses for use in connexion with cargo insurances recommended for general adoption on and after August 1, 1912—*vide* Appendix F. p. 243 *infra*.

rent, re-shipping, or forwarding, for which they would otherwise be liable. Also to pay the insured value of any package or packages which may be totally lost in transhipment."

It really amounts to a *warranty*, and should perhaps have been more properly dealt with under the head of "expressed warranties."

By the terms of this clause, which is ordinarily used in connexion with insurances on goods, the interest is warranted absolutely free from claims for particular average unless the vessel or craft shall have been stranded, sunk, or burnt, or the damage be caused by collision with another ship or craft, or unless any package or packages be totally lost owing to, or during, transhipment from the vessel insured to another vessel, or from the vessel into craft.

We have previously considered (pp. 93 *et seq.*, *supra*), what constitutes a "stranding," a "sinking" and a "burning," so the meaning of these terms need not be again referred to.

With regard to "stranding," however, it should be borne in mind that, in order to entitle the Assured to recover a claim for particular average under the "F.P.A." Clause (and these remarks likewise apply to the "Memorandum"), it is a condition precedent that at the time when the vessel strands the goods shall have been actually on board. This has been decided in two important and interesting cases to which it is proposed now briefly to refer.

The first case was that of *The Thames and Mersey Marine Insurance Company* v. *Pitts, Son and King*.[1] A cargo of River Plate maize was insured from San Nicolas, and from Buenos Ayres, to a port in Europe, 26,910 bags from San Nicolas, and 8,299 from Buenos Ayres. The policy

[1] (1893) VII. Asp. M.L.C., 302.

covered the risk of craft, but was warranted free from particular average (like corn), unless the ship or craft be stranded. The San Nicolas maize was loaded, and the vessel then proceeded down the river Parana towards Buenos Ayres to load the 8,299 bags which were awaiting her arrival there. Whilst on her way down that river she stranded. She was got off, arrived at Buenos Ayres, was found, after survey, to be seaworthy, and she thereupon loaded the Buenos Ayres maize. During the voyage thence to Europe a large portion of the cargo was damaged by sea-water, and the assured sought to recover their loss on the Buenos Ayres maize (shipped, as will be remembered, after the stranding) from their underwriters, alleging that inasmuch as the insurance was warranted free from particular average unless the vessel be stranded, and that as, in fact, the vessel had been stranded, they were entitled to their claim. But the Court held that the assured could not recover on the Buenos Ayres parcel, for the reason that it was not at risk in the vessel when she stranded, and that, therefore, the warranty had not been deleted so far as that portion of the maize was concerned.

The second case was that of the *Alsace and Lorraine*.[1] The insurance was on rice from Calcutta to ports in the West Indies, "warranted free from particular average unless the ship be stranded." During the voyage the vessel met with violent weather, and the master put into Mauritius in order to repair the vessel. The cargo was there discharged, some of it being so badly damaged as to necessitate its condemnation and sale. Whilst the cargo was discharged, and during the progress of the repairs, the vessel was, owing to a gale, stranded on a coral reef, and was subsequently lost. At the time of

[1] *Blackwood, Bryson & Co.* v. *British and Foreign Marine Insurance Co.*, (1893) VII. Asp. M.L.C., p. 362.

this accident, there was, of course, no cargo on board, but it was the intention, after repairs had been effected, to reload the cargo for conveyance to destination. The rice which was fit for reshipment was eventually forwarded to its destination by a vessel called the *Brazil*. Unfortunately the *Brazil* also met with heavy weather, which resulted in damage by sea-water to the rice on board. The assured claimed upon the underwriters for the particular average damage to the rice on the ground that the vessel on which the rice was originally loaded had been stranded. But Mr. Justice Barnes held that the underwriters were not liable inasmuch as the interest was not on board the vessel at the time of the stranding, and the fact that it was contemplated, up to the time of the stranding, that the rice should be reloaded on the *Alsace and Lorraine* did not affect the position.

If, however, the vessel or craft strands whilst the cargo is actually on board, then the underwriter is liable for the whole of the particular average, although the damage may have arisen entirely independently of the stranding (*vide* p. 93 *supra*).

The clause further provides that each craft or lighter shall "be deemed a separate insurance," so that in the event of a lighter stranding, the underwriter would be liable for any particular average damage to the goods, and only to those goods, which were on board the lighter at the time of the stranding.

It will next be well to briefly glance at the following words which appear in the clause we are considering—

> "*Underwriters, notwithstanding this warranty to pay . . . any special charges for warehouse rent, re-shipping, or forwarding, for which they would otherwise be liable.*"

It has already been pointed out (*vide* p. 45 *supra*)

that special charges, in order to be recoverable from underwriters, must have been incurred to avert or minimise a loss for which the underwriters would be liable under their policy. Consequently, if special charges were incurred on account of partial loss or damage, and the goods were insured "warranted free from particular average," such charges would not be recoverable, in the absence of provision in the policy to the contrary. For instance, in the case of *Great Indian Peninsular Railway Co.* v. *Saunders*,[1] a shipment of railway iron was insured from London to Bombay, "warranted free from particular average." The ship was disabled, and was towed to Plymouth seriously damaged, and was there condemned. The rails were discharged and shipped to London, where they were transhipped and forwarded to their original destination at an increased freight. The cost in connexion therewith amounted to some £S25, and the owners of the rails sought to recover this amount under the policy. But the Court held that the underwriter was not liable, as the charges were not incurred to avert a total loss of the rails.

So, by the special stipulation in the "F.P.A." clause above referred to, the underwriter agrees, as an act of grace, to pay special charges for warehouse rent, reshipping, or forwarding, for which he would be liable except for the "F.P.A." warranty.

Grounding in Suez Canal, etc.

"Grounding in the Suez Canal . . . . . not to be deemed a strand, but underwriters to pay any damage or loss which may be proved to have directly resulted therefrom."

In view of the fact that taking the ground in the Suez

[1] (1861) 2 B. & S., 266.

Canal and certain other such places is of common occurrence, this clause was introduced. If the vessel so strands, or rather "grounds," the underwriter on cargo specially agrees to pay any damage or loss directly resulting to the cargo from the grounding, but otherwise the terms of the free of particular average warranty and/or Memorandum remain unaffected. The grounding is, in fact, not to be regarded as technically a stranding, but, as a kind of compromise, underwriters agree to pay any damage actually caused by the grounding.

Foreign General Average Clause

When dealing with general average it was mentioned that, in the absence of any stipulation to the contrary in the contract of affreightment, the law which must govern its adjustment is the law of the port—*i. e.* of the country—of destination, or of the place where the ship and cargo part company if the voyage be broken up. And as the laws of various countries respecting general average differ materially, not only from our own law, but also as between themselves, it can be readily understood that the liability for contribution would equally vary according to the port to which the vessel might be destined. And in order that there should be no doubt as to the liability of the underwriter to pay general average in accordance with foreign law, the following clause came into general use, viz.—

> "*General average and salvage charges payable as per official foreign adjustment if so made up, or per York-Antwerp Rules, if in accordance with the contract of affreightment.*"

By this clause the underwriter agreed not only to pay general average according to foreign statement, but also according to the York-Antwerp Rules, if in accordance with the contract of affreightment.

York-Antwerp Rules

As to the origin and development of the York-Antwerp Rules, that subject does not come within the province of this handbook. Suffice it to say, for present purposes, that they are a code of rules relating to general average agreed upon by English and Foreign jurists, adjusters, shipowners, merchants and underwriters, as the result of meetings held first in York and subsequently at Antwerp (and at Liverpool in 1890), the object being not only to form the basis of a uniform system of general average, but also, by embodying a stipulation in contracts of affreightment that these rules shall govern the adjustment of general average, to obviate, on the one hand, the restrictions of British law, and on the other to introduce uniformity in the place of the divergencies which, as already mentioned, exist between the laws of various countries. The said Rules are XVIII in number, and have been arrived at on the basis of compromise—a kind of *via media*, being a give-and-take on the part of both shipowner and cargo-owner. Three of the principal results of these Rules are—

(*a*) That no jettison of deck-load shall in any circumstances be made good as general average.

(*b*) That no distinction shall be made in the treatment of port of refuge expenses, whether the putting into port be on account of general average sacrifice or on account of particular average damage.

(*c*) That wages and maintenance of crew during detention in a port under average shall be allowed as general average.

Although the contract of affreightment may stipulate that general average shall be adjusted according to York-

Antwerp Rules, it would be more correct to say that the adjustment has to be drawn up in accordance with the law of the port—*i. e.* country—where the voyage terminates or is broken up, subject to the provisions of the York-Antwerp Rules so far as they differ from the law of that country.

When the underwriter agreed by this clause to pay general average according to York-Antwerp Rules, if in accordance with the contract of affreightment, his intention was that the said Rules in their entirety should control the adjustment. Consequently, it was thought that if the contract of affreightment contained reference, not to the Rules in their entirety, but to a mutilated form of them, such, for example, as a stipulation that general average should be adjusted "according to York-Antwerp Rules, excluding Rule I," in such circumstances no effect whatever should be given to the York-Antwerp Rules in ascertaining the liability of the underwriter. In other words, either all the York-Antwerp Rules should apply, or else none, so far as the underwriter was concerned. But a curious and interesting point in this connexion arose in the case of *De Hart* v. *Compañia Anonima "Seguros" Aurora*.[1] A steamer was insured under a time policy, containing the provision "general average payable according to foreign statement or per York-Antwerp Rules, if in accordance with the contract of affreightment." Whilst covered by this policy the vessel was chartered to load a cargo of pine-wood at Pensacola for conveyance to Antwerp, the charter-party stipulating that, "in case of average, the same to be settled according to York-Antwerp Rules, 1890, excepting that jettison of deck cargo (and the freight thereon) for the common safety shall be allowable as general

[1] (1902) VIII. Com. Cas., 42.

average." On sailing from Pensacola, the vessel carried a deck-load, which was jettisoned for the common safety during the voyage, and a statement of general average was drawn up at Antwerp. According to Belgian Law, jettison of deck cargo is not allowable as general average, but Belgian Law likewise recognises as a basis of adjustment any special terms in the contract of affreightment. In the adjustment, the loss by jettison of deck-load was accordingly allowed in general average in consequence of the special stipulation in the charter-party, which rendered inoperative Rule I of the York-Antwerp Rules, viz.—

> "No jettison of deck cargo shall be made good as general average."

The defendant underwriters on hull declined to contribute to the jettison, arguing that the words in the policy, "according to foreign statement," meant "according to foreign statement, without regard to any special contract between the parties to the contract of affreightment." But Mr. Justice Kennedy decided against them on the ground that, in the circumstances, the statement must be regarded as a "foreign" statement, because it was correctly made up according to the law of Belgium, which provided that regard must also be had to any special terms in the contract of affreightment, and that consequently they were liable, inasmuch as they had agreed to pay "according to foreign statement." This judgment was affirmed by the Court of Appeal.[1]

In consequence of the above decisions the following amended clause is now in general use, viz.—

> "*General average and salvage to be adjusted according to the law and practice obtaining at the place where the adventure ends, as if the contract of*

[1] (1903) VIII. Com. Cas., 314 ; IX. Asp. M.L.C., 454.

affreightment contained no special terms upon the subject; or if the contract of affreightment so provides, according to York-Antwerp Rules, or, in the case of Wood cargoes, York-Antwerp Rules omitting the first word of Rule I. ("No"), but, in all matters not specifically referred to in York-Antwerp Rules I. to XVII. inclusive, the adjustment shall be in accordance with the law and practice obtaining at the place where the adventure ends and as if the contract of affreightment contained no special terms upon the subject."

Running-down Clause

In the year 1836 it was decided, in the case of *De Vaux* v. *Salvador*,[1] that the amount which a shipowner had had to pay for damages caused to another vessel by collision was not recoverable from an underwriter under the ordinary wording of the marine policy covering loss of, or damage to, the ship insured. This decision led to the introduction, by means of a clause, of a separate contract, over and above the contract of insurance itself, whereby the underwriter agrees to take upon himself the risk of liability of the owner for damage done by the vessel insured owing to collision with another vessel. The clause embodying this separate contract is called the "Running-down Clause," or, sometimes the "Collision Clause."

The Clause now in general use commences as follows, viz.—

"And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay by way

[1] (1836) 4 A. & E., 420.

of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship insured, this company will pay the assured such proportion of three-fourths of such sum or sums so paid as its subscription bears to the value of the ship hereby insured."

The word "company" appears in the clause above quoted, because it is the form affixed to policies of the companies—otherwise the words "the underwriters" would appear.

So then, in the first part of the contract the underwriter agrees to pay, up to the amount of his policy, three-fourths of any sum which the owner of the ship insured may have to pay, and shall pay, to the owner of another vessel for damage caused by collision. Sometimes the underwriter may specially agree to pay his proportion of the whole (not three-fourths only) of such liability, in which case the clause would be worded accordingly.

With regard to the term "collision," it does not follow that the underwriter's liability is limited to the damages which an owner may have to pay in consequence of the collision immediately between his own vessel and another vessel. It may happen that the vessel insured, A, collides with vessel B, and vessel B is then driven against vessel C, doing damage to the latter. In such a case, the underwriter is liable for his proportion of the damages which the owner of vessel A may have to pay in respect of damage to both vessels B and C. Or again, vessel A may collide with vessel B, driving her aground or against a breakwater or wharf, whereby vessel B sustains serious damage. If the owner of vessel A is liable for the damage, the underwriter will be equally liable within the terms of the collision clause, both for the damage actually caused by the collision

itself, and for the consequential damage sustained through grounding or fouling the breakwater or wharf.

Further, in order to render an underwriter liable for damages resulting from collision, it is not necessary, as already instanced, that the ship insured should herself have been in actual contact with another vessel. Suppose that the vessel insured, A, is in tow of a tug B, and tug B collides with another vessel C. If the owner of vessel A is liable to the owner of vessel C for damages caused to her by tug B, then the underwriter on vessel A is liable under the running-down clause in his policy for his proportion of A's liability to the owner of vessel C, although the vessels A and C have never been in contact at all. In the eye of the law the tug and the tow are considered as one ship, "the motive power being in the tug, and the governing power in the ship that was being towed."[1]

The clause then continues—

> "*And in cases in which the liability of the ship has been contested, or proceedings have been taken to limit liability, with the consent in writing of this company, the company will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur, or be compelled to pay.*"

Of course, as regards the three-fourths, if the underwriter agrees to pay his proportion of the whole of the costs, the necessary alteration is likewise made in the wording.

In the first place it should be noted that the underwriter agrees to bear his proportion of the costs of litigation, or of limitation of liability (which will next be considered) on the condition that the costs have been incurred "with his consent in writing."

[1] *McCowan* v. *Baine* · *The Niobe*, (1891) VII. Asp. M.L.C., p. 89.

Limitation of Liability

By the common law of England (varied, however, as we shall presently see, by a mitigating statute), a shipowner's liability for loss of, or damage to, property, and loss of life or personal injury, would be for the full amount of such loss or damage. But in order to encourage the shipping interest, the legislature have from time to time passed certain Acts to limit this responsibility, the Act at present in force being the Merchant Shipping Act of 1894. This Act provides, *inter alia*, that if, without the actual fault or privity of the owner of a vessel—

(*a*) There is loss of life or personal injury on board that vessel; or

(*b*) There be damage to goods on board that vessel.

Or, if in consequence of the improper navigation of that vessel,

(*c*) There be loss of life or personal injury, caused to any person on board any other vessel; or

(*d*) There be loss or damage caused to any other vessel, or to any goods, etc., on board any other vessel,

the owner of the responsible vessel shall not be liable in damages beyond £15 per ton of the vessel's tonnage if there be loss of life or personal injury, either alone or jointly with property damage, or £8 per ton of the vessel's tonnage, if the damage be to property only.

If, in case of collision, the owner of the wrongdoing vessel desires to avail himself of the provisions of this Act, he must apply to the Court for permission to do so, and when this has been done with the consent in writing of the underwriter, the underwriter agrees to pay his

stipulated proportion of the cost of such proceedings, usually called "limitation suit."

The clause proceeds—

> "*But when both vessels are to blame, then unless the liability of the owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision.*"

First of all, it must be explained that in all cases of collision where both vessels were to blame, the primary basis of settlement was formerly that each vessel should in effect bear one-half of the damage sustained by the other—a rough and ready rule with simplicity as its chief advantage. For many years past, however, conferences have been held from time to time under the auspices of the International Maritime Committee with a view to reconciling by unification the divergent laws on this point prevailing in different countries. And in order to give effect to certain conventions agreed to at a conference held in Brussels in 1910, the Maritime Conventions Act, 1911,[1] was passed on 16th December, 1911, which provides *inter alia* :—

> **1.**—(1) Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault:

[1] *Vide* Appendix C. p. 206.

Provided that—

(*a*) If, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.

So that if one of the vessels is greatly to blame, and the other vessel is also in fault though in a far lesser degree, the liabilities for the damages occasioned are now, under the above-mentioned Act, apportioned between the two vessels as nearly as possible in proportion to their respective degrees of blame; and if it should be found impossible to differentiate between the degrees of blame, then the old rule that each vessel shall bear half the other's damages will be resorted to. For example, assuming in all cases the—

Damages sustained by vessel A to be £4,000,

Damages sustained by vessel B to be £2,000,

in the event of A's liability for the collision being assessed at 75 %, and B's liability at 25 %—

A's primary liability to B would be £1,500 (75 % of £2,000),

B's primary liability to A would be £1,000 (25 % of (£4,000);

or again, assuming A's liability to be $66\frac{2}{3}$ %, and B's liability $33\frac{1}{3}$ %—

A's primary liability to B would be £1,333 ($66\frac{2}{3}$ % of £2,000),

B's primary liability to A would be £1,333 ($33\frac{1}{3}$ % of £4,000);

or in the event of the liability being apportioned equally—

A's primary liability to B would be £1,000 (one-half of £2,000),

B's primary liability to A would be £2,000 (one-half of £4,000).

Our Courts have decided, however, that the settlement in such cases is not to be made on the basis of what is termed *cross* liability, *i. e.* as if there was in fact a liability on the part of the owner of the one vessel towards the owner of the other vessel, and *vice versâ*, but it is to be on the basis of a *single* liability—the difference between the greater liability and the lesser.[1]

Thus in the first example given, instead of A being deemed liable to B for £1,500 and B being deemed liable to A for £1,000, A is to be regarded as liable to B for £500 only, this being the difference between the respective liabilities of A and B : in the second example there would be no legal liability attaching either to A or to B, inasmuch as the amounts recoverable *inter se* would be identical : in the third example, on the same basis, B's liability to A would be £1,000. Therefore, as legally viewed, in the first example B has had nothing to pay; in the second example neither A nor B has had anything to pay; and in the third example A has had nothing to pay: consequently, in the absence of a stipulation to the contrary, their respective underwriters would accordingly escape liability under the running-down clause. In order to avoid such a result, however, underwriters have agreed that settlement of claims shall be on the principle of *cross* liabilities, and this is the reason for the appearance of the above words in the clause. In the foregoing imaginary figures, under the principle of *cross* liabilities, in the first example A would be deemed to have to pay B £1,500, and B would be deemed to have to pay A £1,000 : in the second example both A and B would be deemed to have to pay to one another £1,333 : and in the third example, A would be

[1] *Stoomvaart Maatschappij* v. *P. & O. S. N. Co.*, (1882) IV. Asp. M. L. C., 567.

deemed to have to pay B £1,000 and B would be deemed to have to pay A £2,000: and the underwriters on vessel A or vessel B respectively would settle on this basis.

Then follows the following important provision—

"Provided always that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury."

It speaks for itself, and calls for no special comment.

"Sister Ship" Clause

"Should the vessel hereby insured come into collision with or receive salvage services from another vessel belonging wholly or in part to the same owners, or under the same management, the assured shall have the same rights under this policy as they would have were the other vessel entirely the property of owners not interested in the vessel hereby insured; but in such cases the liability for the collision, or the amount payable for the services rendered, shall be referred to a sole arbitrator to be agreed upon between the underwriters and the assured."

The reason for the insertion, or adoption, of this clause is that, according to law,[1] a person cannot sue himself. This clause has already been referred to when dealing with Subrogation.[2]

[1] *Simpson* v. *Thompson*, (1877) III. Asp. M.L.C., 567.

[2] Page 127 *supra*.

"Inchmaree" Clause

"This insurance also specially to cover (subject to the free of average warranty) loss of, or damage to hull or machinery through the negligence of master, mariners, engineers, or pilots, or through explosion, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull: provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager. Masters, mates, engineers, pilots, or crew not to be considered as part owners within the meaning of this clause should they hold shares in the steamer."

The framing, and introduction into general use, of this clause—a clause greatly extending the liabilities of the underwriter—followed the judgment of the House of Lords in the celebrated case of the steamer *Inchmaree*,[1] from which it derives the title by which it is commonly known. The said vessel was insured under a time policy in the ordinary form. When the donkey-engine was set to work, for navigation purposes, in order to pump water into the main boilers, a valve, which ought to have been kept open, had been, either accidentally or negligently, closed, with the result that the water, instead of passing into the boiler, was forced into the air chamber of the donkey-pump and split it. The House of Lords, reversing the judgments of the Courts below, held that this was not a loss covered by an ordinary marine policy, being neither a peril of the sea nor coming within the general words "all other perils, losses," etc.

The clause, it will be noted, specially covers loss or

[1] *Thames and Mersey Marine Insurance Co., Ltd.* v. *Hamilton, Fraser & Co.*, (1887) VI. Asp. M. L C., 200.

damage to hull or machinery "through any *latent defect* in the machinery or hull," and the precise meaning to be attached to this stipulation has recently been the subject of judicial decisions, to which it will be useful to refer.

The first case was that of the steamer *Zealandia*,[1] the insurance being for twelve months on hull, etc., whilst in San Francisco harbour (a port risk), the "Inchmaree" clause being included in the policy. During the currency of the policy the vessel was placed in dry dock for the purpose of being overhauled, and on the tail shaft being drawn into the tunnel for examination (it had not been previously examined for over two years) a flaw was discovered, the said flaw being the result of an imperfect weld, and in consequence the shaft was condemned. The question was whether or not this was loss or damage "through any latent defect in the machinery" within the meaning of the clause. It was held by Walton, J., and affirmed by the Court of Appeal, that there was no evidence to show that there was any loss through a latent defect during the currency of the policy, and that the insurance did not cover the mere discovery of a latent defect whilst the vessel was at San Francisco: and that therefore the underwriter was not liable.

The following passage in the judgment of Walton, J., was adopted, and alluded to as an admirable statement, by the Court of Appeal in a subsequent case:[2]—"I have to construe the clause. It seems to me quite plain that the effect and sense of this clause is not that the underwriters guarantee that the machinery of the vessel is

[1] *Oceanic Steamship Co.* v. *Faber*, (1907) XIII. Com. Cas. 28; X. Asp. M.L.C., 515.

[2] *Hutchins* v. *Royal Exchange Assurance*, (1911) XVI. Com. Cas. at p. 243; XII. Asp. M.L.C., 21.

free from latent defects, or undertake, if such defects are discovered during the currency of the policy, to make such defects good. It is plain that that is neither the intention of those who drew this clause nor is it the sense of the clause itself if reasonably read and reasonably construed. The underwriters agree to indemnify the owner against any loss of or damage to the hull or machinery through any latent defect, so that a claim does not fall within the clause unless there is loss of or damage to the hull or machinery, or some part of the hull or machinery, and there is no claim unless that damage has been caused through a latent defect, or through one or other of the causes that are mentioned in the clause—in this particular case through a latent defect. Therefore there must be a latent defect causing loss of or damage to the hull or machinery, and causing that loss of or damage to the hull or machinery during the currency of the policy under which the claim is made. If those conditions are fulfilled, the underwriters are liable to indemnify the owners in respect of that loss or damage."

A subsequent case was that of the steamship *Ellaline*,[1] the policy being for twelve months from December 1908 and including the "Inchmaree Clause." The facts in that case were as follow:—The vessel was built in 1906 and the stern frame was obtained by the builders from a continental firm. In the process of casting this stern frame a cooling crack occurred, and this defect had been concealed by the makers by filling it up with metal, welded by some heating process, and covering it with some steel wash. The defect was not discovered by the builders of the vessel or by Lloyd's surveyors who

[1] *Hutchins* v. *Royal Exchange Assurance*, (1911) XVI. Com. Cas. 132, 242; XI. Asp. M.L.C., 580.

classed her: and the Assured knew nothing about it. On the vessel being docked in March 1909 for painting, this defect was discovered in the process of scraping, and in consequence the stern frame was condemned. The question was, again, whether this was a loss "through any latent defect" within the meaning of the clause. Scrutton, J., held that there had been no loss or damage to the hull during the currency of the policy from perils insured against, and that therefore the assured were not entitled to recover. In the course of his judgment Scrutton, J., said: "Has any part of the hull been lost in fact during the currency of the policy? The stern frame has not been lost in fact; it is there as it was before the policy began; the only change is that a previous latent defect has by wear and tear become patent. It has not been constructively lost during the currency of the policy; it was constructively lost in 1906 if the two facts had been known; what has happened during the currency of the policy is the discovery of the true facts." And this was affirmed by the Court of Appeal. Speaking of the discovery of the defect Fletcher Moulton, L.J., said:—"It is suggested that that constitutes loss of or damage to hull or machinery by a latent defect. It was nothing of the kind. It was a mere latent defect itself. To hold that this "Inchmaree Clause" covered the costs of that would be to make it not an insurance clause, but a guarantee clause, a warranty that the hull and machinery were free from latent defects, and the consequence of that would be that everything that could be discovered during the currency of the policy would have to be repaired at the cost of the insurers. I am satisfied that there are no words within this clause which compel me to adopt such an interpretation, and the fact that the clause begins

by being an express insurance against loss or damage negatives the possibility of such an interpretation."

"This case appears to me to afford a good example of the legitimate claims which the 'Inchmaree Clause' was intended to cover," said Scrutton, J., in the course of his judgment in *C. J. Wills & Sons* v. *World Marine Insurance Co., Ltd.*[1] In that case the policy was on a dredger for twelve months and contained the "Inchmaree Clause." Owing to a defect in the weld of a link in a hoisting chain of the dredger, the link broke, and the ladder and buckets fell, doing considerable damage to the dredger's hull and machinery. The damage in question was held to come within the meaning of the clause under consideration.

Continuation Clause

> "*Should the vessel at the expiration of this policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided previous notice be given to the underwriters, be held covered at a* pro rata *monthly premium, to her port of destination.*"

The effect of this very common clause in "time" policies is to place the shipowner, when the ship is at sea on the expiration of the policy, and in consideration of a *pro rata* additional premium, in the same position as if he had insured his vessel for the particular voyage in the course of which the policy expired, instead of for a portion only of the time occupied in the prosecution of that voyage. It will no doubt be remembered that, as already mentioned (p. 14 *supra*), a policy for more than twelve months is void by statute. It was the cause of no little stir in the underwriting world when our Courts

[1] *Shipping Gazette*, March 18, 1911.

pronounced[1] that "time" policies for twelve months, which had affixed to them the "Continuation Clause," capable of carrying them on beyond that period, were void in consequence. It has since been enacted, however, that no insurance shall be invalid on the ground that, by reason of the "Continuation Clause," it may become available for a period exceeding twelve months, provided that a sixpenny stamp be affixed to the policy, in addition to the ordinary policy duty, in respect of the special agreement contained in the clause which we are now considering; and if, on expiry of the policy, the insurance is extended in accordance with the clause, whether by issue of a new policy or by endorsement on the original policy, such new policy or endorsement must be stamped with the amount of the duty requisite for the voyage or period covered, as if it were a fresh insurance altogether.

Re-insurance Clause

> "*Being a re-insurance subject to the same clauses and conditions as the original policy or policies, and to pay as may be paid thereon.*"

This clause is used in cases of re-insurance, *i. e.* where an underwriter who has accepted a risk re-insures the whole or a part of that risk with another underwriter, either because he deems the risk undesirable, or because he has accepted a greater pecuniary responsibility in respect of a particular risk than he thinks it prudent to retain.

With regard to the agreement in this clause, "to pay as may be paid thereon," *i. e.* on the original policy, there are two conditions which must have been complied with—

[1] *Charlesworth* v. *Faber: The Merrimac*, (1900) V. Com. Cas., 408; *Royal Exchange Assurance Corporation* v. *Sjoforsakrings, Aktie-Bolaget Vega*, (1901) VI. Com. Cas., 189.

i. The loss which has been paid must have been a loss for which the original underwriter is legally liable; and

ii. It must have been a loss for which the re-insuring underwriter is, under the particular terms of the re-insurance policy, also liable.

As an illustration which embraces both these conditions may be instanced the case of *Chippendale and others* v. *Holt*.[1] The plaintiffs re-insured with defendant a hull-risk per the steamer *Ajmir*, the re-insurance policy providing that the re-insurance was "subject to the same clauses and conditions as the original policy and to pay as may be paid thereon, but against the risk of total or constructive loss only." In that case it was held that the defendant was only bound to indemnify the plaintiffs against a loss for which the plaintiffs were liable under their policy, and that, therefore, where the plaintiffs had in good faith paid as for a constructive total loss, when as a matter of fact there was no constructive total loss, and consequently no liability for them to settle a constructive total loss, they could not recover the amount so paid from the defendant. The conditions of the re-insurance policy must be strictly complied with, and the fact that the original underwriters may have voluntarily or inadvertently paid that which they were not legally obliged to pay, did not affect the liability of the re-insurer.[2]

"Time Penalty" Clause

In policies on chartered freight (*i. e.* as already explained, the amount paid for the hire of a vessel) there is

[1] (1895) I. Com. Cas, 197.

[2] Cf. also *Marten* v. *Steamship Owners' Underwriting Association*, (1902) VII. Com. Cas., 195.

now usually inserted what is called the "Time Penalty Clause," which reads as follows, viz.—

> "*Warranted free from any claims consequent on loss of time, whether arising from a peril of the sea, or otherwise.*"

The terms of this clause have been strictly construed by our Courts, and the theory of *causa proxima*, i. e. that the proximate cause and not the remote cause must be looked to, has been most rigorously applied. The last case which came before our Courts in connexion with this clause was that of *Turnbull, Martin and Co.* v. *Hull Underwriters' Association*,[1] and it will probably lead to a better understanding of the construction placed upon this clause if a short *résumé* of that case is given. A steamer was regularly engaged in carrying frozen meat from Australia to London, and engagements for shipments of homeward cargo were booked whilst the steamer was on the voyage out to Australia. The plaintiffs accordingly effected an insurance with defendants "on freight of frozen meat, chartered, or as if chartered, on board or not on board," the policy containing the clause: "Chartered freights and freights are warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise." Whilst the vessel was at Sydney, about to load, a fire occurred on board, which destroyed the refrigerating machinery. The damage could not without great delay have been repaired at Sydney, and it was therefore impossible for the steamer to carry the frozen meat which had been engaged for her, or any frozen meat at all, on the homeward voyage, and the freight was consequently lost. The plaintiffs sued the defendant underwriters for a total loss of freight under the policy, but it

[1] (1900) V. Com. Cas., 248. *Vide* also *Bensaude* v. *Thames and Mersey M. I. Co.* (1897) II. Com. Cas., 238; VIII. Asp. M. L C., 315.

was held that the claim was consequent on loss of time within the meaning of the clause in the policy, and that consequently the underwriters were not liable. "The ship," said Mr. Justice Mathew, "was damaged by a peril insured against; and her capacity to carry frozen meat was suspended until her machinery had been repaired. If she could have been repaired promptly, there would have been no loss of freight. The loss, therefore, was 'consequent on loss of time,' within the meaning of the warranty."

"Strikes, etc.," Clause

In view of the prevailing labour unrest and the attendant strikes and lock-outs which have unfortunately been so much in evidence of recent years, the following clause is now generally inserted in marine policies, viz.—

> "*Warranted free of loss or damage caused by strikers, locked out workmen or persons taking part in labour disturbances or riots or civil commotions.*"

The risks specially excluded thereunder may, of course, be covered by agreement with the underwriter on payment of any special premium which the prevailing circumstances may require.

CHAPTER XII

RETURNS OF PREMIUM

A FEW words may usefully be added, in conclusion, regarding returns of premium, *i. e.* repayment by the underwriter of the whole of the premium received by him, or of a portion of it if so provided for in the policy. This subject is dealt with generally in §§ 82-84 of the Marine Insurance Act.[1]

The whole of the premium received by the underwriter would be returnable by him if the risk insured had never had an inception, and, therefore, the consideration for the payment of the premium totally failed. In such a case the return of the premium is usually termed a return for "cancelment" of the policy.

Partial returns of premium are frequently stipulated for in marine policies, especially in the case of insurance of hulls of vessels for periods of time. For example, it is generally provided in "time" policies that a certain amount *per cent.*, representing a proportionate part of the premium, shall be returned for each uncommenced month if it be mutually agreed between the underwriter and the assured to cancel the policy;[2] or, similarly, for each consecutive thirty days, or sometimes fifteen days, the vessel may be laid up in port, or if laid up in the United Kingdom not under average (*i. e.* undergoing repairs for

[1] *Vide* p. 193 *infra.*

[2] Cf. *Pyman* v. *Marten* (1907) XIII. Com. Cas., 64 p. 16 *supra.*

the cost of which the underwriter is liable); or, again, if she be laid up under average, or if laid up abroad.

Usually the words "and arrival" are inserted after the provisions for returns of premium, a stipulation which, for example, would preclude the recovery of the return of premium under a "time" policy, in the event of the vessel being lost during its currency, for the cancelment of the unexpired period between the happening of the loss and the termination of the insurance.

It sometimes happens that cargo may by inadvertence be insured twice over with different underwriters, as, for example, by the shipper on the one hand and by the purchaser on the other, the latter having no knowledge that the insurance would be effected by the former. In such circumstances it is usual for each underwriter, always provided that neither of the policies has at any time solely borne the entire risk, to return to the assured half the premium, retaining the remaining half and bearing the corresponding half of the risk. If, however, either of the underwriters has at any time solely borne the entire risk he will be entitled to retain the whole of the premium.

APPENDIX A

MARINE INSURANCE ACT, 1906

[6 EDW. 7. CH. 41.]

ARRANGEMENT OF SECTIONS

Marine Insurance.

A.I. 1906.

Disclosure and Representations.

17 Insurance is uberrimae fidei.
18. Disclosure by assured.
19. Disclosure by agent effecting insurance.
20. Representations pending negotiation of contract.
21. When contract is deemed to be concluded.

The Policy.

22. Contract must be embodied in policy.
23. What policy must specify.
24 Signature of insurer.
25. Voyage and time policies.
26. Designation of subject-matter.
27. Valued policy.
28. Unvalued policy.
29. Floating policy by ship or ships.
30. Construction of terms in policy.
31. Premium to be arranged.

Double Insurance.

32. Double insurance.

Warranties, etc.

33 Nature of warranty.
34 When breach of warranty excused.
35 Express warranties.
36. Warranty of neutrality.
37. No implied warranty of nationality.
38. Warranty of good safety.
39. Warranty of seaworthiness of ship.
40. No implied warranty that goods are seaworthy.
41. Warranty of legality.

A.D. 1906.

The Voyage.

42. Implied condition as to commencement of risk.
43. Alteration of port of departure.
44. Sailing for different destination.
45. Change of voyage.
46. Deviation.
47. Several ports of discharge.
48. Delay in voyage.
49. Excuses for deviation or delay.

Assignment of Policy.

50. When and how policy is assignable.
51. Assured who has no interest cannot assign.

The Premium.

52. When premium payable.
53. Policy effected through broker.
54. Effect of receipt on policy.

Loss and Abandonment.

55. Included and excluded losses.
56. Partial and total loss.
57. Actual total loss.
58. Missing ship.
59. Effect of transhipment, etc.
60. Constructive total loss defined.
61. Effect of constructive total loss.
62. Notice of abandonment.
63. Effect of abandonment.

Partial Losses (including Salvage and General Average and Particular Charges).

64. Particular average loss.
65. Salvage charges.
66. General average loss.

A.D. 1906.

Measure of Indemnity.

67. Extent of liability of insurer for loss.
68. Total loss.
69. Partial loss of ship.
70. Partial loss of freight.
71. Partial loss of goods, merchandise, etc.
72. Apportionment of valuation.
73. General average contributions and salvage charges.
74. Liabilities to third parties.
75. General provisions as to measure of indemnity.
76. Particular average warranties.
77. Successive losses.
78. Suing and labouring clause.

Rights of Insurer on Payment.

79. Right of subrogation.
80. Right of contribution.
81. Effect of under-insurance.

Return of Premium.

82. Enforcement of return.
83. Return by agreement.
84. Return for failure of consideration.

Mutual Insurance.

85. Modification of Act in case of mutual insurance.

Supplemental.

86. Ratification by assured
87. Implied obligations varied by agreement or usage.
88. Reasonable time, etc., a question of fact.
89. Slip as evidence.
90. Interpretation of terms.

A.D. 1906.

MARINE INSURANCE ACT, 1906

CHAPTER 41

[6 EDW. 7.]

An Act to codify the Law relating to Marine Insurance.

[21st December 1906.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows—

Marine Insurance.

Marine insurance defined.

1. A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.

Mixed sea and land risks.

2.—(1) A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage.

(2) Where a ship in course of building, or the launch of a ship, or any adventure analogous to a marine adventure, is covered by a policy in the form of a marine policy, the provisions of this Act, in so far as applicable,

A.D. 1906.

shall apply thereto; but, except as by this section provided, nothing in this Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as by this Act defined.

Marine adventure and maritime perils defined.

3.—(1) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.

(2) In particular there is a marine adventure where—

(*a*) Any ship goods or other movables are exposed to maritime perils. Such property is in this Act referred to as "insurable property";

(*b*) The earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils;

(*c*) Any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.

"Maritime perils" means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy.

Insurable Interest.

Avoidance of wagering or gaming contracts.

4.—(1) Every contract of marine insurance by way of gaming or wagering is void.

(2) A contract of marine insurance is deemed to be a gaming or wagering contract—

(*a*) Where the assured has not an insurable interest as defined by this Act, and the contract is entered

into with no expectation of acquiring such an interest; or A.D 1906.

(*b*) Where the policy is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term:

Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer.

Insurable interest defined.

5.—(1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.

(2) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.

When interest must attach.

6.—(1) The assured must be interested in the subject-matter insured at the time of the loss though he need not be interested when the assurance is effected:

Provided that where the subject-matter is insured "lost or not lost," the assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the assured was aware of the loss, and the insurer was not.

(2) Where the assured has no interest at the time of the loss, he cannot acquire interest by any act or election after he is aware of the loss.

Defeasible or contingent interest

7.—(1) A defeasible interest is insurable, as also is a contingent interest.

(2) In particular, where the buyer of goods has insured

A.D. 1906.

them, he has an insurable interest, notwithstanding that he might, at his election, have rejected the goods, or have treated them as at the seller's risk, by reason of the latter's delay in making delivery or otherwise.

Partial interest.

8. A partial interest of any nature is insurable.

Re-insurance.

9.—(1) The insurer under a contract of marine insurance has an insurable interest in his risk, and may re-insure in respect of it.

(2) Unless the policy otherwise provides, the original assured has no right or interest in respect of such re-insurance.

Bottomry.

10. The lender of money on bottomry or respondentia has an insurable interest in respect of the loan.

Master's and seamen's wages.

11. The master or any member of the crew of a ship has an insurable interest, in respect of his wages.

Advance freight.

12. In the case of advance freight, the person advancing the freight has an insurable interest, in so far as such freight is not repayable in case of loss.

Charges of insurance.

13. The assured has an insurable interest in the charges of any insurance which he may effect.

Quantum of interest.

14.—(1) Where the subject-matter insured is mortgaged, the mortgagor has an insurable interest in the full value thereof, and the mortgagee has an insurable interest in respect of any sum due or to become due under the mortgage.

(2) A mortgagee, consignee, or other person having an interest in the subject-matter insured may insure on behalf and for the benefit of other persons interested as well as for his own benefit.

(3) The owner of insurable property has an insurable interest in respect of the full value thereof, notwithstanding that some third person may have agreed, or be liable, to indemnify him in case of loss.

Assignment of interest.

15. Where the assured assigns or otherwise parts with

his interest in the subject-matter insured, he does not thereby transfer to the assignee his rights under the contract of insurance, unless there be an express or implied agreement with the assignee to that effect. A.D. 1906.

But the provisions of this section do not affect a transmission of interest by operation of law.

Insurable Value.

16. Subject to any express provision or valuation in the policy, the insurable value of the subject-matter insured must be ascertained as follows— Measure of insurable value.

(1) In insurance on ship, the insurable value is the value, at the commencement of the risk, of the ship, including her outfit, provisions and stores for the officers and crew, money advanced for seamen's wages, and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, plus the charges of insurance upon the whole:

The insurable value, in the case of a steamship, includes also the machinery, boilers, and coals and engine stores if owned by the assured, and, in the case of a ship engaged in special trade, the ordinary fittings requisite for that trade:

(2) In insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured, plus the charges of insurance:

(3) In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole:

A.D. 1906.

(4) In insurance on any other subject-matter, the insurable value is the amount at the risk of the assured when the policy attaches, plus the charges of insurance.

Disclosure and Representations.

Insurance is uberrimae fidei.

17. A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

Disclosure by assured.

18.—(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) In the absence of inquiry the following circumstances need not be disclosed, namely—

(*a*) Any circumstance which diminishes the risk;

(*b*) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;

(*c*) Any circumstance as to which information is waived by the insurer;

(*d*) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

A.D. 1906.

(4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.

(5) The term "circumstance" includes any communication made to, or information received by, the assured.

Disclosure by agent effecting insurance.

19. Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer—

(*a*) Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and

(*b*) Every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent.

Representations pending negotiation of contract.

20.—(1) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.

(2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.

(4) A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.

(5) A representation as to a matter of expectation or belief is true if it be made in good faith.

A.D. 1906.

(6) A representation may be withdrawn or corrected before the contract is concluded.

(7) Whether a particular representation be material or not is, in each case, a question of fact.

When contract is deemed to be concluded.

21. A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract, although it be unstamped.

The Policy.

Contract must be embodied in policy.

22. Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act. The policy may be executed and issued either at the time when the contract is concluded, or afterwards.

What policy must specify.

23. A marine policy must specify—

(1) The name of the assured, or of some person who effects the insurance on his behalf:

(2) The subject-matter insured and the risk insured against:

(3) The voyage, or period of time, or both, as the case may be, covered by the insurance:

(4) The sum or sums insured:

(5) The name or names of the insurers.

Signature of insurer.

24.—(1) A marine policy must be signed by or on behalf of the insurer, provided that in the case of a corporation the corporate seal may be sufficient, but nothing in this section shall be construed as requiring the subscription of a corporation to be under seal.

(2) Where a policy is subscribed by or on behalf of

two or more insurers, each subscription, unless the contrary be expressed, constitutes a distinct contract with the assured.

Voyage and time policies.

25.—(1) Where the contract is to insure the subject-matter at and from, or from one place to another or others, the policy is called a "voyage policy," and where the contract is to insure the subject-matter for a definite period of time the policy is called a "time policy." A contract for both voyage and time may be included in the same policy.

1 Edw. 7. c. 7.

(2) Subject to the provisions of section eleven of the Finance Act, 1901, a time policy which is made for any time exceeding twelve months is invalid.

Designation of subject-matter.

26.—(1) The subject-matter insured must be designated in a marine policy with reasonable certainty.

(2) The nature and extent of the interest of the assured in the subject-matter insured need not be specified in the policy.

(3) Where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered.

(4) In the application of this section regard shall be had to any usage regulating the designation of the subject-matter insured.

Valued policy.

27.—(1) A policy may be either valued or unvalued.

(2) A valued policy is a policy which specifies the agreed value of the subject-matter insured.

(3) Subject to the provisions of this Act, and in the absence of fraud, the value fixed by the policy is, as between the insurer and assured, conclusive of the insurable value of the subject intended to be insured whether the loss be total or partial.

(4) Unless the policy otherwise provides, the value fixed by the policy is not conclusive for the purpose of

A.D. 1906.

determining whether there has been a constructive total loss.

Unvalued policy.

28. An unvalued policy is a policy which does not specify the value of the subject-matter insured, but, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained, in the manner herein-before specified.

Floating policy by ship or ships.

29.—(1) A floating policy is a policy which describes the insurance in general terms, and leaves the name of the ship or ships and other particulars to be defined by subsequent declaration.

(2) The subsequent declaration or declarations may be made by indorsement on the policy, or in other customary manner.

(3) Unless the policy otherwise provides, the declarations must be made in the order of dispatch or shipment. They must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith.

(4) Unless the policy otherwise provides, where a declaration of value is not made until after notice of loss or arrival, the policy must be treated as an unvalued policy as regards the subject-matter of that declaration.

Construction of terms in policy.

30.—(1) A policy may be in the form in the First Schedule to this Act.

(2) Subject to the provisions of this Act, and unless the context of the policy otherwise requires, the terms and expressions mentioned in the First Schedule to this Act shall be construed as having the scope and meaning in that schedule assigned to them.

Premium to be arranged.

31.—(1) Where an insurance is effected at a premium

to be arranged, and no arrangement is made, a reasonable premium is payable.

(2) Where an insurance is effected on the terms that an additional premium is to be arranged in a given event, and that event happens but no arrangement is made, then a reasonable additional premium is payable.

Double Insurance

Double insurance.

32.—(1) Where two or more policies are effected by or on behalf of the assured on the same adventure and interest or any part thereof, and the sums insured exceed the indemnity allowed by this Act, the assured is said to be over-insured by double insurance.

(2) Where the assured is over-insured by double insurance—

(*a*) The assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he may think fit, provided that he is not entitled to receive any sum in excess of the indemnity allowed by this Act;

(*b*) Where the policy under which the assured claims is a valued policy, the assured must give credit as against the valuation for any sum received by him under any other policy without regard to the actual value of the subject-matter insured;

(*c*) Where the policy under which the assured claims is an unvalued policy he must give credit, as against the full insurable value, for any sum received by him under any other policy;

(*d*) Where the assured receives any sum in excess of the indemnity allowed by this Act, he is deemed to hold such sum in trust for the

A.D. 1906.

insurers, according to their right of contribution among themselves.

Warranties, etc.

Nature of warranty.

33.—(1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

(2) A warranty may be express or implied.

(3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

When breach of warranty excused.

34.—(1) Non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law.

(2) Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss.

(3) A breach of warranty may be waived by the insurer.

Express warranties.

35.—(1) An express warranty may be in any form of words from which the intention to warrant is to be inferred.

(2) An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy.

(3) An express warranty does not exclude an implied warranty, unless it be inconsistent therewith. A.D. 1906.

Warranty of neutrality.

36.—(1) Where insurable property, whether ship or goods, is expressly warranted neutral, there is an implied condition that the property shall have a neutral character at the commencement of the risk, and that, so far as the assured can control the matter, its neutral character shall be preserved during the risk.

(2) Where a ship is expressly warranted "neutral" there is also an implied condition that, so far as the assured can control the matter, she shall be properly documented, that is to say, that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. If any loss occurs through breach of this condition, the insurer may avoid the contract.

No implied warranty of nationality.

37. There is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk.

Warranty of good safety.

38. Where the subject-matter insured is warranted "well" or "in good safety" on a particular day, it is sufficient if it be safe at any time during that day.

Warranty of seaworthiness of ship.

39.—(1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.

(2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.

(3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the com-

A.D. 1906.

mencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.

(4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.

(5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

No implied warranty that goods are seaworthy.

40.—(1) In a policy on goods or other movables there is no implied warranty that the goods or movables are seaworthy.

(2) In a voyage policy on goods or other movables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other movables to the destination contemplated by the policy.

Warranty of legality.

41. There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.

The Voyage.

Implied condition as to commencement of risk.

42.—(1) Where the subject-matter is insured by a voyage policy "at and from" or "from" a particular place, it is not necessary that the ship should be at that place when the contract is concluded, but there is an implied condition that the adventure shall be commenced within a reasonable time, and that if the adventure be not so commenced the insurer may avoid the contract.

(2) The implied condition may be negatived by showing

that the delay was caused by circumstances known to the insurer before the contract was concluded, or by showing that he waived the condition.

Alteration of port of departure.

43. Where the place of departure is specified by the policy, and the ship instead of sailing from that place sails from any other place, the risk does not attach.

Sailing for different destination.

44. Where the destination is specified in the policy, and the ship, instead of sailing for that destination, sails for any other destination, the risk does not attach.

Change of voyage.

45.—(1) Where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy, there is said to be a change of voyage.

(2) Unless the policy otherwise provides, where there is a change of voyage, the insurer is discharged from liability as from the time of change, that is to say, as from the time when the determination to change it is manifested; and it is immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs.

Deviation.

46.—(1) Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs.

(2) There is a deviation from the voyage contemplated by the policy—

(*a*) Where the course of the voyage is specifically designated by the policy, and that course is departed from; or

(*b*) Where the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from.

(3) The intention to deviate is immaterial; there must

A.D. 1906.

be a deviation in fact to discharge the insurer from his liability under the contract.

Several ports of discharge.

47.—(1) Where several ports of discharge are specified by the policy, the ship may proceed to all or any of them, but, in the absence of any usage or sufficient cause to the contrary, she must proceed to them, or such of them as she goes to, in the order designated by the policy. If she does not there is a deviation.

(2) Where the policy is to "ports of discharge," within a given area, which are not named, the ship must, in the absence of any usage or sufficient cause to the contrary, proceed to them, or such of them as she goes to, in their geographical order. If she does not there is a deviation.

Delay in voyage.

48. In the case of a voyage policy, the adventure insured must be prosecuted throughout its course with reasonable dispatch, and, if without lawful excuse it is not so prosecuted, the insurer is discharged from liability as from the time when the delay became unreasonable.

Excuses for deviation or delay.

49.—(1) Deviation or delay in prosecuting the voyage contemplated by the policy is excused—

(*a*) Where authorised by any special term in the policy; or

(*b*) Where caused by circumstances beyond the control of the master and his employer; or

(*c*) Where reasonably necessary in order to comply with an express or implied warranty; or

(*d*) Where reasonably necessary for the safety of the ship or subject-matter insured; or

(*e*) For the purpose of saving human life, or aiding a ship in distress where human life may be in danger; or

(*f*) Where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship; or

(*g*) Where caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against. A.D. 1906.

(2) When the cause excusing the deviation or delay ceases to operate, the ship must resume her course, and prosecute her voyage, with reasonable despatch.

Assignment of Policy.

When and how policy is assignable.

50.—(1) A marine policy is assignable unless it contains terms expressly prohibiting assignment. It may be assigned either before or after loss.

(2) Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

(3) A marine policy may be assigned by indorsement thereon or in other customary manner.

Assured who has no interest cannot assign.

51. Where the assured has parted with or lost his interest in the subject-matter insured, and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative:

Provided that nothing in this section affects the assignment of a policy after loss.

The Premium.

When premium payable.

52. Unless otherwise agreed, the duty of the assured or his agent to pay the premium, and the duty of the insurer to issue the policy to the assured or his agent, are concurrent conditions, and the insurer is not bound to issue the policy until payment or tender of the premium.

A.D. 1906.

Policy effected through broker.

53.—(1) Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses, or in respect of returnable premium.

(2) Unless otherwise agreed, the broker has, as against the assured, a lien upon the policy for the amount of the premium and his charges in respect of effecting the policy; and, where he has dealt with the person who employs him as a principal, he has also a lien on the policy in respect of any balance on any insurance account which may be due to him from such person, unless when the debt was incurred he had reason to believe that such person was only an agent.

Effect of receipt on policy.

54. Where a marine policy effected on behalf of the assured by a broker acknowledges the receipt of the premium, such acknowledgment is, in the absence of fraud, conclusive as between the insurer and the assured, but not as between the insurer and broker.

Loss and Abandonment.

Included and excluded losses.

55.—(1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.

(2) In particular—

(*a*) The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would

not have happened but for the misconduct or negligence of the master or crew;

(*b*) Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against;

(*c*) Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils.

Partial and total loss.

56.—(1) A loss may be either total or partial. Any loss other than a total loss, as hereinafter defined, is a partial loss.

(2) A total loss may be either an actual total loss, or a constructive total loss.

(3) Unless a different intention appears from the terms of the policy, an insurance against total loss includes a constructive, as well as an actual, total loss.

(4) Where the assured brings an action for a total loss and the evidence proves only a partial loss, he may, unless the policy otherwise provides, recover for a partial loss.

(5) Where goods reach their destination in specie, but by reason of obliteration of marks, or otherwise, they are incapable of identification, the loss, if any, is partial, and not total.

Actual total loss.

57.—(1) Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.

(2) In the case of an actual total loss no notice of abandonment need be given.

A.D. 1906.

Missing ship.

58. Where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed.

Effect of transhipment, etc.

59. Where, by a peril insured against, the voyage is interrupted at an intermediate port or place, under such circumstances as, apart from any special stipulation in the contract of affreightment, to justify the master in landing and re-shipping the goods or other movables, or in transhipping them, and sending them on to their destination, the liability of the insurer continues, notwithstanding the landing or transhipment.

Constructive total loss defined.

60.—(1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

(2) In particular, there is a constructive total loss—

(i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (*a*) it is unlikely that he can recover the ship or goods, as the case may be, or (*b*) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or

(ii) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.

In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other

interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired; or

(iii) In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.

Effect of constructive total loss.

61. Where there is a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss.

Notice of abandonment.

62.—(1) Subject to the provisions of this section, where the assured elects to abandon the subject-matter insured to the insurer, he must give notice of abandonment. If he fails to do so the loss can only be treated as a partial loss.

(2) Notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth, and may be given in any terms which indicate the intention of the assured to abandon his insured interest in the subject-matter insured unconditionally to the insurer.

(3) Notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where the information is of a doubtful character the assured is entitled to a reasonable time to make inquiry.

(4) Where notice of abandonment is properly given, the rights of the assured are not prejudiced by the fact that the insurer refuses to accept the abandonment.

(5) The acceptance of an abandonment may be either express or implied from the conduct of the insurer. The mere silence of the insurer after notice is not an acceptance.

A.D. 1906.

(6) Where notice of abandonment is accepted the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice.

(7) Notice of abandonment is unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him.

(8) Notice of abandonment may be waived by the insurer.

(9) Where an insurer has re-insured his risk, no notice of abandonment need be given by him.

Effect of abandonment.

63.—(1) Where there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto.

(2) Upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; and, where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss.

Partial Losses (including Salvage and General Average and Particular Charges).

Particular average loss.

64.—(1) A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss.

(2) Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called

particular charges. Particular charges are not included in particular average.

Salvage charges.

65.—(1) Subject to any express provision in the policy, salvage charges incurred in preventing a loss by perils insured against may be recovered as a loss by those perils.

(2) "Salvage charges" means the charges recoverable under maritime law by a salvor independently of contract. They do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them, for the purpose of averting a peril insured against. Such expenses, where properly incurred, may be recovered as particular charges or as a general average loss, according to the circumstances under which they were incurred.

General average loss.

66.—(1) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.

(2) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.

(3) Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested, and such contribution is called a general average contribution.

(4) Subject to any express provision in the policy, where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him; and, in the case of a general average sacrifice, he may recover from

A.D. 1906.

the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute.

(5) Subject to any express provision in the policy, where the assured has paid, or is liable to pay, a general average contribution in respect of the subject insured, he may recover therefor from the insurer.

(6) In the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connexion with the avoidance of, a peril insured against.

(7) Where ship, freight, and cargo, or any two of those interests, are owned by the same assured, the liability of the insurer in respect of general average losses or contributions is to be determined as if those subjects were owned by different persons.

Measure of Indemnity.

Extent of liability of insurer for loss.

67.—(1) The sum which the assured can recover in respect of a loss on a policy by which he is insured, in the case of an unvalued policy to the full extent of the insurable value, or, in the case of a valued policy to the full extent of the value fixed by the policy, is called the measure of indemnity.

(2) Where there is a loss recoverable under the policy, the insurer, or each insurer if there be more than one, is liable for such proportion of the measure of indemnity as the amount of his subscription bears to the value fixed by the policy in the case of a valued policy, or to the insurable value in the case of an unvalued policy.

Total loss.

68. Subject to the provisions of this Act and to any express provision in the policy, where there is a total loss of the subject-matter insured—

A.D. 1906.

(1) If the policy be a valued policy, the measure of indemnity is the sum fixed by the policy:

(2) If the policy be an unvalued policy, the measure of indemnity is the insurable value of the subject-matter insured.

Partial loss of ship.

69. Where a ship is damaged, but is not totally lost, the measure of indemnity, subject to any express provision in the policy, is as follows—

(1) Where the ship has been repaired, the assured is entitled to the reasonable cost of the repairs, less the customary deductions, but not exceeding the sum insured in respect of any one casualty:

(2) Where the ship has been only partially repaired, the assured is entitled to the reasonable cost of such repairs, computed as above, and also to be indemnified for the reasonable depreciation, if any, arising from the unrepaired damage, provided that the aggregate amount shall not exceed the cost of repairing the whole damage, computed as above:

(3) Where the ship has not been repaired, and has not been sold in her damaged state during the risk, the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage, computed as above.

Partial loss of freight.

70. Subject to any express provision in the policy, where there is a partial loss of freight, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at the risk of the assured under the policy.

A.D. 1906.

Partial loss of goods, merchandise, etc.

71.—Where there is a partial loss of goods, merchandise, or other movables, the measure of indemnity, subject to any express provision in the policy, is as follows—

(1) Where part of the goods, merchandise or other movables insured by a valued policy is totally lost, the measure of indemnity is such proportion of the sum fixed by the policy as the insurable value of the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy:

(2) Where part of the goods, merchandise, or other movables insured by an unvalued policy is totally lost, the measure of indemnity is the insurable value of the part lost, ascertained as in case of total loss:

(3) Where the whole or any part of the goods or merchandise insured has been delivered damaged at its destination, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value:

(4) "Gross value" means the wholesale price or, if there be no such price, the estimated value, with, in either case, freight, landing charges, and duty paid beforehand; provided that, in the case of goods or merchandise customarily sold in bond, the bonded price is deemed to be the gross value. "Gross proceeds" means the actual price obtained at a sale where all charges on sale are paid by the sellers.

Apportionment of valuation.

72.—(1) Where different species of property are insured under a single valuation, the valuation must be

apportioned over the different species in proportion to their respective insurable values, as in the case of an unvalued policy. The insured value of any part of a species is such proportion of the total insured value of the same as the insurable value of the part bears to the insurable value of the whole, ascertained in both cases as provided by this Act.

(2) Where a valuation has to be apportioned, and particulars of the prime cost of each separate species, quality, or description of goods cannot be ascertained, the division of the valuation may be made over the net arrived sound values of the different species, qualities, or descriptions of goods.

General average contributions and salvage charges.

73.—(1) Subject to any express provision in the policy, where the assured has paid, or is liable for, any general average contribution, the measure of indemnity is the full amount of such contribution, if the subject-matter liable to contribution is insured for its full contributory value; but, if such subject-matter be not insured for its full contributory value, or if only part of it be insured, the indemnity payable by the insurer must be reduced in proportion to the under-insurance, and where there has been a particular average loss which constitutes a deduction from the contributory value, and for which the insurer is liable, that amount must be deducted from the insured value in order to ascertain what the insurer is liable to contribute.

(2) Where the insurer is liable for salvage charges the extent of his liability must be determined on the like principle.

Liabilities to third parties.

74. Where the assured has effected an insurance in express terms against any liability to a third party, the measure of indemnity, subject to any express provision in the policy, is the amount paid or payable by him to such third party in respect of such liability.

A.D. 1906.

General provisions as to measure of indemnity.

75.—(1) Where there has been a loss in respect of any subject-matter not expressly provided for in the foregoing provisions of this Act, the measure of indemnity shall be ascertained, as nearly as may be, in accordance with those provisions, in so far as applicable to the particular case.

(2) Nothing in the provisions of this Act relating to the measure of indemnity shall affect the rules relating to double insurance, or prohibit the insurer from disproving interest wholly or in part, or from showing that at the time of the loss the whole or any part of the subject-matter insured was not at risk under the policy.

Particular average warranties.

76.—(1) Where the subject-matter insured is warranted free from particular average, the assured cannot recover for a loss of part, other than a loss incurred by a general average sacrifice, unless the contract contained in the policy be apportionable; but, if the contract be apportionable, the assured may recover for a total loss of any apportionable part.

(2) Where the subject-matter insured is warranted free from particular average, either wholly or under a certain percentage, the insurer is nevertheless liable for salvage charges, and for particular charges and other expenses properly incurred pursuant to the provisions of the suing and labouring clause in order to avert a loss insured against.

(3) Unless the policy otherwise provides, where the subject-matter insured is warranted free from particular average under a specified percentage, a general average loss cannot be added to a particular average loss to make up the specified percentage.

(4) For the purpose of ascertaining whether the specified percentage has been reached, regard shall be had only to the actual loss suffered by the subject-matter

insured. Particular charges and the expenses of and incidental to ascertaining and proving the loss must be excluded.

Successive losses.

77.—(1) Unless the policy otherwise provides, and subject to the provisions of this Act, the insurer is liable for successive losses, even though the total amount of such losses may exceed the sum insured.

(2) Where, under the same policy, a partial loss, which has not been repaired or otherwise made good, is followed by a total loss, the assured can only recover in respect of the total loss:

Provided that nothing in this section shall affect the liability of the insurer under the suing and labouring clause.

Suing and labouring clause.

78.—(1) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage.

(2) General average losses and contributions and salvage charges, as defined by this Act, are not recoverable under the suing and labouring clause.

(3) Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause.

(4) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss.

A.D. 1906.

Rights of Insurer on Payment.

Right of subrogat on.

79.—(1) Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss.

(2) Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss.

Right of contribution.

80.—(1) Where the assured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute ratably to the loss in proportion to the amount for which he is liable under his contract.

(2) If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt.

Effect of under-insurance.

81. Where the assured is insured for an amount less than the insurable value or, in the case of a valued policy for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance.

Return of Premium. A.D. 1906.

Enforcement of return.

82. Where the premium, or a proportionate part thereof is, by this Act, declared to be returnable—

(*a*) If already paid, it may be recovered by the assured from the insurer; and

(*b*) If unpaid, it may be retained by the assured or his agent.

Return by agreement.

83. Where the policy contains a stipulation for the return of the premium, or a proportionate part thereof, on the happening of a certain event, and that event happens, the premium, or, as the case may be, the proportionate part thereof, is thereupon returnable to the assured.

Return for failure of consideration.

84.—(1) Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured.

(2) Where the consideration for the payment of the premium is apportionable and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium is, under the like conditions, thereupon returnable to the assured.

(3) In particular—

(*a*) Where the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality on the part of the assured; but if the risk is not apportionable, and has once attached, the premium is not returnable:

(*b*) Where the subject-matter insured, or part thereof, has never been imperilled, the premium, or,

A.D. 1906.

as the case may be, a proportionate part thereof, is returnable:

Provided that where the subject-matter has been insured "lost or not lost" and has arrived in safety at the time when the contract is concluded, the premium is not returnable unless, at such time, the insurer knew of the safe arrival;

(*c*) Where the assured has no insurable interest throughout the currency of the risk, the premium is returnable, provided that this rule does not apply to a policy effected by way of gaming or wagering;

(*d*) Where the assured has a defeasible interest which is terminated during the currency of the risk, the premium is not returnable;

(*e*) Where the assured has over-insured under an unvalued policy, a proportionate part of the premium is not returnable;

(*f*) Subject to the foregoing provisions, where the assured has over-insured by double insurance, a proportionate part of the several premiums is returnable:

Provided that, if the policies are effected at different times, and any earlier policy has at any time borne the entire risk, or if a claim has been paid on the policy in respect of the full sum insured thereby, no premium is returnable in respect of that policy, and when the double insurance is effected knowingly by the assured no premium is returnable.

A.D. 1906.

Mutual Insurance.

Modification of Act in case of mutual insurance.

85.—(1) Where two or more persons mutually agree to insure each other against marine losses there is said to be a mutual insurance.

(2) The provisions of this Act relating to the premium do not apply to mutual insurance, but a guarantee, or such other arrangement as may be agreed upon, may be substituted for the premium.

(3) The provisions of this Act, in so far as they may be modified by the agreement of the parties, may in the case of mutual insurance be modified by the terms of the policies issued by the association, or by the rules and regulations of the association.

(4) Subject to the exceptions mentioned in this section the provisions of this Act apply to a mutual insurance.

Supplemental.

Ratification by assured.

86. Where a contract of marine insurance is in good faith effected by one person on behalf of another, the person on whose behalf it is effected may ratify the contract even after he is aware of a loss.

Implied obligations varied by agreement or usage.

87.—(1) Where any right, duty, or liability would arise under a contract of marine insurance by implication of law, it may be negatived or varied by express agreement, or by usage, if the usage be such as to bind both parties to the contract.

(2) The provisions of this section extend to any right, duty, or liability declared by this Act which may be lawfully modified by agreement.

Reasonable time, etc., a question of fact.

88. Where by this Act any reference is made to reasonable time, reasonable premium, or reasonable diligence, the question what is reasonable is a question of fact.

Slip as evidence.

89. Where there is a duly stamped policy, reference

A.D. 1906.

may be made, as heretofore, to the slip or covering note, in any legal proceeding.

Interpretation of terms.

90. In this Act, unless the context or subject-matter otherwise requires—

"Action" includes counter-claim and set off:

"Freight" includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or movables, as well as freight payable by a third party, but does not include passage money:

"Movables" means any movable tangible property, other than the ship, and includes money, valuable securities, and other documents:

"Policy" means a marine policy.

Savings.

91.—(1) Nothing in this Act, or in any repeal effected thereby, shall affect—

54 & 55 Vict. c. 39.

(*a*) The provisions of the Stamp Act, 1891, or any enactment for the time being in force relating to the revenue;

25 & 26 Vict. c. 89.

(*b*) The provisions of the Companies Act, 1862, or any enactment amended or substituted for the same;

(*c*) The provisions of any statute not expressly repealed by this Act.

(2) The rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance.

Repeals.

92. The enactments mentioned in the Second Schedule to this Act are hereby repealed to the extent specified in that schedule.

Commencement.

93. This Act shall come into operation on the first day of January one thousand nine hundred and seven.

Short title.

94. This Act may be cited as the Marine Insurance Act, 1906.

SCHEDULES

FIRST SCHEDULE

Section 30.

Form of Policy

Be it known that as well in Lloyd's S.G. policy.
own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all doth make assurance and cause
and them, and every of them, to be insured lost or not lost, at and from
Upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the
whereof is master under God, for this present voyage,

or whosoever else shall go for master in the said ship, or by whatsoever other name or names the said ship, or the master thereof, is or shall be named or called; beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship,

upon the said ship, etc.

and so shall continue and endure, during her abode there,

A.D. 1906.

upon the said ship, etc. And further, until the said ship, with all her ordnance, tackle, apparel, etc., and goods and merchandises whatsoever shall be arrived at

upon the said ship, etc., until she hath moored at anchor twenty-four hours in good safety; and upon the goods and merchandises, until the same be there discharged and safely landed. And it shall be lawful for the said ship, etc., in this voyage, to proceed and sail to and touch and stay at any ports or places whatsoever

without prejudice to this insurance. The said ship, etc., goods and merchandises, etc., for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at

Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage: they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, etc., or any part thereof. And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns, to sue, labour, and travel for, in and about the defence, safeguards, and recovery of the said goods and merchandises, and ship, etc., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity

[Sue and labour clause.]

of his sum herein assured. And it is especially declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver, or acceptance of abandonment. And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we, the assurers, are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of A.D. 1906. [Waiver clause.]

IN WITNESS whereof we, the assurers, have subscribed our names and sums assured in London.

N.B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded—sugar, tobacco, hemp, flax, hides and skins are warranted free from average, under five pounds per cent., and all other goods, also the ship and freight, are warranted free from average, under three pounds per cent. unless general, or the ship be stranded. [Memorandum.

Rules for Construction of Policy.

The following are the rules referred to by this Act for the construction of a policy in the above or other like form, where the context does not otherwise require—

1. Where the subject-matter is insured "lost or not lost," and the loss has occurred before the contract is concluded, the risk attaches unless, at such time the assured was aware of the loss, and the insurer was not. Lost or not lost.

A.D. 1906.

From.

2. Where the subject-matter is insured "from" a particular place, the risk does not attach until the ship starts on the voyage insured.

At and from. [Ship.]

3.—(*a*) Where a ship is insured "at and from" a particular place, and she is at that place in good safety when the contract is concluded, the risk attaches immediately.

(*b*) If she be not at that place when the contract is concluded the risk attaches as soon as she arrives there in good safety, and, unless the policy otherwise provides, it is immaterial that she is covered by another policy for a specified time after arrival.

[Freight.]

(*c*) Where chartered freight is insured "at and from" a particular place, and the ship is at that place in good safety when the contract is concluded the risk attaches immediately. If she be not there when the contract is concluded, the risk attaches as soon as she arrives there in good safety.

(*d*) Where freight, other than chartered freight, is payable without special conditions and is insured "at and from" a particular place, the risk attaches *pro rata* as the goods or merchandise are shipped; provided that if there be cargo in readiness which belongs to the ship-owner, or which some other person has contracted with him to ship, the risk attaches as soon as the ship is ready to receive such cargo.

From the loading thereof.

4. Where goods or other movables are insured "from the loading thereof," the risk does not attach until such goods or movables are actually on board, and the insurer is not liable for them while in transit from the shore to the ship.

Safely landed.

5. Where the risk on goods or other movables continues until they are "safely landed," they must be landed in the customary manner and within a reasonable

time after arrival at the port of discharge, and if they are not so landed the risk ceases. A.D. 1906.

6. In the absence of any further licence or usage, the liberty to touch and stay "at any port or place whatsoever" does not authorise the ship to depart from the course of her voyage from the port of departure to the port of destination. Touch and stay.

7. The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves. Perils of the seas.

8. The term "pirates" includes passengers who mutiny and rioters who attack the ship from the shore. Pirates.

9. The term "thieves" does not cover clandestine theft or a theft committed by any one of the ship's company, whether crew or passengers. Thieves.

10. The term "arrests, etc., of kings, princes, and people" refers to political or executive acts, and does not include a loss caused by riot or by ordinary judicial process. Restraint of princes.

11. The term "barratry" includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer. Barratry.

12. The term "all other perils" includes only perils similar in kind to the perils specifically mentioned in the policy. All other perils.

13. The term "average unless general" means a partial loss of the subject-matter insured other than a general average loss, and does not include "particular charges." Average unless general.

14. Where the ship has stranded, the insurer is liable for the excepted losses, although the loss is not attributable to the stranding, provided that when the stranding takes place the risk has attached and, if the policy be on goods, that the damaged goods are on board. Stranded.

15. The term "ship" includes the hull, materials and outfit, stores and provisions for the officers and crew, and, Ship.

A.D. 1906.

in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade, and also, in the case of a steamship, the machinery, boilers, and coals and engine stores, if owned by the assured.

Freight.

16. The term "freight" includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or movables, as well as freight payable by a third party, but does not include passage money.

17. The term "goods" means goods in the nature of merchandise, and does not include personal effects or provisions and stores for use on board.

Goods.

In the absence of any usage to the contrary, deck cargo and living animals must be insured specifically, and not under the general denomination of goods.

SECOND SCHEDULE

Enactments Repealed

Session and Chap	Title or Short Title	Extent of Repeal
19 Geo. 2. c. 37	An Act to regulate insurance on ships belonging to the subjects of Great Britain, and on merchandizes or effects laden thereon.	The whole Act.
28 Geo. 3. c. 56.	An Act to repeal an Act made in the twenty-fifth year of the reign of his present Majesty, intituled "An Act for regulating Insurances on Ships, and on goods, merchandises, or effects," and for substituting other provisions for the like purpose in lieu thereof.	The whole Act so far as it relates to marine insurance.
31 & 32 Vict. c. 86.	The Policies of Marine Assurance Act, 1868.	The whole Act.

APPENDIX B

MARINE INSURANCE (GAMBLING POLICIES) ACT, 1909

[9 EDW. 7. CH. 12]

CHAPTER 12

AN ACT TO PROHIBIT GAMBLING ON LOSS BY MARITIME PERILS [20th October 1909]

A.D. 1909.

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Prohibition of gambling on loss by maritime perils.

1.—(1) If—

(*a*) any person effects a contract of marine insurance without having any bonâ fide interest, direct or indirect, either in the safe arrival of the ship in relation to which the contract is made or in the safety or preservation of the subject-matter insured, or a bonâ fide expectation of acquiring such an interest; or

(*b*) any person in the employment of the owner of a ship, not being a part owner of the ship, effects a contract of marine insurance in

A.D. 1909.

relation to the ship, and the contract is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term,

the contract shall be deemed to be a contract by way of gambling on loss by maritime perils, and the person effecting it shall be guilty of an offence, and shall be liable, on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding six months or to a fine not exceeding one hundred pounds, and in either case to forfeit to the Crown any money he may receive under the contract.

(2) Any broker or other person through whom, and any insurer with whom, any such contract is effected shall be guilty of an offence and liable on summary conviction to the like penalties if he acted knowing that the contract was by way of gambling on loss by maritime perils within the meaning of this Act.

(3) Proceedings under this Act shall not be instituted without the consent in England of the Attorney-General, in Scotland of the Lord Advocate, and in Ireland of the Attorney-General for Ireland.

(4) Proceedings shall not be instituted under this Act against a person (other than a person in the employment of the owner of the ship in relation to which the contract was made) alleged to have effected a contract by way of gambling on loss by maritime perils until an opportunity has been afforded him of showing that the contract was not such a contract as aforesaid, and any information given by that person for that purpose shall not be admissible in evidence against him in any prosecution under this Act.

(5) If proceedings under this Act are taken against any

person (other than a person in the employment of the owner of the ship in relation to which the contract was made) for effecting such a contract, and the contract was made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term, the contract shall be deemed to be a contract by way of gambling on loss by maritime perils unless the contrary is proved.

(6) For the purpose of giving jurisdiction under this Act, every offence shall be deemed to have been committed either in the place in which the same actually was committed or in any place in which the offender may be.

(7) Any person aggrieved by an order or decision of a court of summary jurisdiction under this Act, may appeal to quarter sessions.

(8) For the purposes of this Act the expression "owner" includes charterer.

(9) Subsection (7) of this section shall not apply to Scotland.

Short title. 6 Edw. 7. c. 41.

2.—This Act may be cited as the Marine Insurance (Gambling Policies) Act, 1909, and the Marine Insurance Act, 1906, and this Act may be cited together as the Marine Insurance Acts, 1906 and 1909.

APPENDIX C

MARITIME CONVENTIONS ACT, 1911

[1 & 2 GEO. 5. CH. 57]

A.D. 1911.

ARRANGEMENT OF SECTIONS

CHAPTER 57

A.D. 1911.

AN ACT TO AMEND THE LAW RELATING TO MERCHANT SHIPPING WITH A VIEW TO ENABLING CERTAIN CONVENTIONS TO BE CARRIED INTO EFFECT

[16th December 1911.]

WHEREAS at the Conference held at Brussels in the year nineteen hundred and ten two conventions, dealing respectively with collisions between vessels and with salvage, were signed on behalf of His Majesty, and it is desirable that such amendments should be made in the law relating to merchant shipping as will enable effect to be given to the conventions:

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Provisions as to Collisions, &c.

Rule as to division of loss.

1.—(1) Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault:

Provided that—

(*a*) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and

(*b*) nothing in this section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed; and

A.D. 1911.

(c) nothing in this section shall affect the liability of any person under a contract of carriage or any contract, or shall be construed as imposing any liability upon any person from which he is exempted by any contract or by any provision of law, or as affecting the right of any person to limit his liability in the manner provided by law.

(2) For the purposes of this Act, the expression "freight" includes passage money and hire, and references to damage or loss caused by the fault of a vessel shall be construed as including references to any salvage or other expenses, consequent upon that fault, recoverable at law by way of damages.

Damages for personal injuries.

2.—Where loss of life or personal injuries are suffered by any person on board a vessel owing to the fault of that vessel and of any other vessel or vessels, the liability of the owners of the vessels shall be joint and several:

Provided that nothing in this section shall be construed as depriving any person of any right of defence on which, independently of this section, he might have relied in an action brought against him by the person injured, or any person or persons entitled to sue in respect of such loss of life, or shall affect the right of any person to limit his liability in cases to which this section relates in the manner provided by law.

Right of contribution.

3.—(1) Where loss of life or personal injuries are suffered by any person on board a vessel owing to the fault of that vessel and any other vessel or vessels, and a proportion of the damages is recovered against the owners of one of the vessels which exceeds the proportion in which she was in fault, they may recover by way of contribution the amount of the excess from the owners of the

other vessel or vessels to the extent to which those vessels were respectively in fault: A.D. 1911.

Provided that no amount shall be so recovered which could not, by reason of any statutory or contractual limitation of, or exemption from, liability, or which could not for any other reason, have been recovered in the first instance as damages by the persons entitled to sue therefor.

(2) In addition to any other remedy provided by law, the persons entitled to any such contribution as aforesaid shall, for the purpose of recovering the same, have, subject to the provisions of this Act, the same rights and powers as the persons entitled to sue for damages in the first instance.

Abolition of statutory presumptions of fault. 57 & 58 Vict. c. 60.

4.—(1) Subsection (4) of section four hundred and nineteen of the Merchant Shipping Act, 1894 (which provides that a ship shall be deemed in fault in a case of collision where any of the collision regulations have been infringed by that ship), is hereby repealed.

(2) The failure of the master or person in charge of a vessel to comply with the provisions of section four hundred and twenty-two of the Merchant Shipping Act, 1894 (which imposes a duty upon masters and persons in charge of vessels after a collision to stand by and assist the other vessel) shall not raise any presumption of law that the collision was caused by his wrongful act, neglect, or default, and accordingly subsection (2) of that section shall be repealed.

Jurisdiction in cases of loss of life or personal injury.

5.—Any enactment which confers on any court Admiralty jurisdiction in respect of damage shall have effect as though references to such damage included references to damages for loss of life or personal injury, and accordingly proceedings in respect of such damages may be brought in rem or in personam.

A D. 1911.

Provisions as to Salvage.

General duty to render assistance to persons in danger at sea.

6.—(1) The master or person in charge of a vessel shall, so far as he can do so without serious danger to his own vessel, her crew and passengers (if any), render assistance to every person, even if such person be a subject of a foreign State at war with His Majesty, who is found at sea in danger of being lost, and if he fails to do so, he shall be guilty of a misdemeanour.

(2) Compliance by the master or person in charge of a vessel with the provisions of this section shall not affect his right or the right of any other person to salvage.

Apportionment of salvage amongst owners, etc. of foreign ship.

7.—Where any dispute arises as to the apportionment of any amount of salvage among the owners, master, pilot, crew, and other persons in the service of any foreign vessel, the amount shall be apportioned by the court or person making the apportionment in accordance with the law of the country to which the vessel belongs.

General Provisions.

Limitation of actions.

8.—No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight, or any property on board her, or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel, whether such vessel be wholly or partly in fault, or in respect of any salvage services, unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused or the salvage services were rendered, and an action shall not be maintainable under this Act to enforce any contribution in respect of an overpaid proportion of any damages for loss of life or personal injuries unless proceedings therein are commenced within one year from the date of payment:

Provided that any court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of the court, extend any such period, to such extent and on such conditions as it thinks fit, and shall if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court, or within the territorial waters of the country to which the plaintiff's ship belongs or in which the plaintiff resides or has his principal place of business, extend any such period to an extent sufficient to give such reasonable opportunity. A.D. 1911.

Application of Act.

9.—(1) This Act shall extend throughout His Majesty's dominions and to any territories under his protection, and to Cyprus.

Provided that it shall not extend to the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, and Newfoundland.

(2) This Act shall not apply in any case in which proceedings have been taken before the passing thereof and all such cases shall be determined as though this Act had not been passed.

(3) The provisions of this Act shall be applied in all cases heard and determined in any court having jurisdiction to deal with the case and in whatever waters the damage or loss in question was caused or the salvage services in question were rendered, and subsection (9) of section twenty-five of the Supreme Court of Judicature Act, 1873, shall cease to have effect. 36 & 37 Vict. c. 66.

(4) This Act shall apply to any persons other than the owners responsible for the fault of the vessel as though the expression "owners" included such persons, and in any case where, by virtue of any charter or demise, or

A.D. 1911.

for any other reason, the owners are not responsible for the navigation and management of the vessel, this Act shall be read as though for references to the owners there were substituted references to the charterers or other persons for the time being so responsible.

Short title and construction.

10.—This Act may be cited as the Maritime Conventions Act, 1911, and shall be construed as one with the Merchant Shipping Acts, 1894 to 1907.

APPENDIX D*

RULES OF PRACTICE

ADOPTED BY THE ASSOCIATION OF AVERAGE ADJUSTERS UP TO MAY 1912

Adjustments "for the Consideration of Underwriters."

That any adjustment prepared for the consideration of underwriters shall include a statement of the reasons of the average adjuster for making such adjustment, and, when submitted in conjunction with a claim for which underwriters are liable, shall be contained in an entirely separate document. To such adjustments the following note shall be appended, viz. :—

"This adjustment has been prepared by request, to enable the assured to submit the case to underwriters."

Interest and Commission for Advancing Funds.

That in practice interest and commission for advancing funds are only allowable in average when, proper and necessary steps having been taken to make a collection on account, an out-of-pocket expense for interest and/or commission for advancing funds is reasonably incurred.

Agency Commission and Agency.

That in practice neither commission (excepting bank commission) nor any charge by way of agency or remuneration for trouble is allowed to the shipowner in

* By kind permission of the Association of Average Adjusters.

average, except in respect of services rendered on behalf of cargo when such services are not involved in the contract of affreightment.

Duty of Adjusters in respect of Cost of Repairs.

That in adjusting particular average on ship or general average which includes repairs, it is the duty of the adjuster to satisfy himself that such reasonable and usual precautions have been taken to keep down the cost of repairs as a prudent shipowner would have taken if uninsured.

Claims for Damage to Ship's Machinery.

That no claim for damage to ship's machinery shall be admitted into an adjustment unless a survey has been held upon such machinery by competent and disinterested engineers as soon as practicable after the occurrence of the casualty giving rise to the claim; a certificate of such survey, reporting as to the nature and cause of the damage, to be furnished to the adjuster; or unless clear proof be given to the adjuster that the holding of such survey or the obtaining of such certificate is impracticable, which proof is to be set forth on the face of the adjustment.

Claims on Ship's Machinery.

That in all claims on ship's machinery for repairs, no claim for a new propeller or new shaft shall be admitted into an adjustment, unless the adjuster shall obtain and insert into his statement evidence showing what has become of the old propeller or shaft.

Water Casks (Custom of Lloyd's, 1876*).*

Water casks or tanks carried on a ship's deck are not paid for by underwriters as general or particular average;

nor are warps or other articles when improperly carried on deck.

GENERAL AVERAGE—

Basis of Adjustment.

That in any adjustment of general average not made in accordance with British Law it shall be prefaced on what principle or according to what law the adjustment has been made, and the reason for so adjusting the claim shall be set forth.

In all cases the adjuster shall give particulars in a prominent position in the average statement of the clause or clauses contained in the charter-party and/or bills of lading with reference to the adjustment of general average.

Deck-load Jettison (*Custom of Lloyd's Amended*, 1890–91).

The jettison of a deck-load carried according to the usage of trade and not in violation of the contracts of affreightment is general average.

There is an exception to this rule in case of cargoes of cotton, tallow, acids, and some other goods.

Damage by Water used to extinguish Fire.

That damage done by water poured down a ship's hold to extinguish a fire be treated as general average.

Damage caused by Water thrown upon Burning Goods.

That goods in a ship which is on fire, or the cargo of which is on fire, affected by water voluntarily used to extinguish such fire, shall not be the subject of general average if the packages so affected be themselves on fire at the time the water was thrown upon them.

Voluntary Stranding (*Custom of Lloyd's*, 1876).

The custom of Lloyd's excludes from general average all damage to ship or cargo resulting from a voluntary stranding,

This rule does not necessarily exclude such damage as is done by beaching or scuttling a burning vessel to extinguish the fire.

Expenses lightening a Ship when ashore (Custom of Lloyd's as Amended, 1890–91).

When a ship is ashore, and, in order to float her, cargo is put into lighters, and is then at once re-shipped, the whole cost of lightering, including lighter hire and re-shipping, is general average.

Sails set to force a Ship off the Ground (Custom of Lloyd's, 1876).

Sails damaged by being set, or kept set, to force a ship off the ground or to drive her higher up the ground for the common safety, are general average.

Stranded Vessels: Damage to Engines in getting off.

That damage caused to machinery and boilers of a stranded vessel, in endeavouring to refloat for the common safety, when the interests are in peril, be allowed in general average.

Claims arising out of Deficiency of Fuel.

That in adjusting general average arising out of deficiency of fuel the facts on which the general average is based shall be set forth in the adjustment, including the material dates and distances, and particulars of fuel supplies and consumption.

Resort to Port of Refuge for General Average Repairs: Treatment of the Charges incurred.

That when a ship puts into a port of refuge in consequence of damage which is itself the subject of general

average, and sails thence with her original cargo, or a part of it, the outward as well as the inward port charges shall be treated as general average; and when cargo is discharged for the purpose of repairing such damage, the warehouse rent and reloading of the same shall, as well as the discharge, be treated as general average. (See *Attwood* v. *Sellar*.)

Resort to Port of Refuge on account of Particular Average Repairs: Treatment of the Charges incurred.

That when a ship puts into a port of refuge in consequence of damage which is itself the subject of particular average (or not of general average), and when the cargo has been discharged in consequence of such damage, the inward port charges and the cost of discharging the cargo shall be general average, the warehouse rent of cargo shall be a particular charge on cargo, and the cost of reloading and outward port charges shall be a particular charge on freight. (See *Svendsen* v. *Wallace*.)

Treatment of Costs of Storage and Reloading at Port of Refuge.

That when the cargo is discharged for the purpose of repairing, re-conditioning or diminishing damage to ship or cargo which is itself the subject of general average, the cost of storage on it and of reloading it shall be treated as general average, equally with the cost of discharging it.

Expenses at a Port of Refuge (*Custom of Lloyd's Amended*, 1890–91).

When a ship puts into a port of refuge on account of accident and not in consequence of damage which is itself the subject of general average, then, on the assump-

tion that the ship was seaworthy at the commencement of the voyage, the custom of Lloyd's is as follows:—

(*a*)—All cost of towage, pilotage, harbour dues, and
1876 other extraordinary expenses incurred in order to bring the ship and cargo into a place of safety, are general average. Under the term "extraordinary expenses" are not included wages or victuals of crew, coals, or engine stores, or demurrage.

(*b*)—The cost of discharging the cargo, whether
1876 for the common safety, or to repair the ship, together with the cost of conveying it to the warehouse, is general average.

The cost of discharging the cargo on account of damage to it resulting from its own *vice-propre*, is chargeable to the owners of the cargo.

(*c*)—The warehouse rent, or other expenses which
1876 take the place of warehouse rent, of the cargo when so discharged, is, except as under, a special charge on the cargo.

(*d*)—The cost of reloading the cargo, and the out-
1876 ward port charges incurred through leaving the port of refuge, are, when the discharge of cargo falls in general average, a special charge on freight.

(*e*)—The expenses referred to in clause (*d*) are
1876 charged to the party who runs the risk of freight—that is, wholly to the charterer if the whole freight has been prepaid; and if part only, then in the proportion which the part prepaid bears to the whole freight.

(*f*) When the cargo, instead of being sent ashore, is placed on board hulk or lighters during the

ship's stay in port, the hulk-hire is divided between general average, cargo, and freight, in such proportions as may place the several contributing interests in nearly the same relative positions as if the cargo had been landed and stored.

Treatment of Costs of Extraordinary Discharge.

That no distinction be drawn in practice between discharging cargo for the common safety of ship and cargo, and discharging it for the purpose of effecting at an intermediate port or ports of refuge repairs necessary for the prosecution of the voyage.

Towage from a Port of Refuge.

That if a ship be in a port of refuge at which it is practicable to repair her, and if, in order to save expense, she be towed thence to some other port, then the extra cost of such towage shall be divided in proportion to the saving of expense thereby occasioned to the several parties to the adventure.

Cargo forwarded from a Port of Refuge.

That if a ship be in a port of refuge at which it is practicable to repair her so as to enable her to carry on the whole cargo, but, in order to save expense, the cargo, or a portion of it, be transhipped by another vessel, or otherwise forwarded, then the cost of such transhipment (up to the amount of expense saved) shall be divided in proportion to the saving of expense thereby occasioned to the several parties to the adventure.

Cargo sold at a Port of Refuge.

That if a ship be in a port of refuge at which it is practicable to repair her so as to enable her to carry on

the whole cargo, or such portion of it as is fit to be carried on, but, in order to save expense, the cargo, or a portion of it, be, with the consent of the owners of such cargo, sold at the port of refuge, then the loss by sale including loss of freight on cargo so sold (up to the amount of expense saved) shall be divided in proportion to the saving of expense thereby occasioned to the several parties to the adventure; provided always that the amount so divided shall in no case exceed the cost of transhipment and/or forwarding referred to in the preceding rule of the Association.

Interpretation of the Rule respecting Substituted Expenses.

That for the purpose of avoiding any misinterpretation of the resolution relating to the apportionment of substituted expenses, it is declared that the saving of expense therein mentioned is limited to a saving or reduction of the actual outlay, including the crew's wages and provisions, if any, which would have been incurred at the port of refuge, if the vessel had been repaired there, and does not include supposed losses or expenses, such as interest, loss of market, demurrage, or assumed damage by discharging.

Damage caused to Cargo during Forced Discharge.

That whenever the cost of discharging cargo is general average, all loss or damage necessarily arising to cargo therefrom shall be allowed in general average.

Treatment of Damage to Cargo caused by Discharge, Storing, and Reloading.

That damage necessarily done to cargo by discharging, storing, and reloading it, be treated as general average when, and only when, the cost of those measures respectively is so treated.

Deductions from Cost of Repairs to Iron Vessels in adjusting General Average.

That in adjusting claims for general average, repairs to iron vessels shall be subject to the following deductions in respect of "new for old," viz.—

From Date of Original Register.

Up to 1 year old (A.)	All repairs to be allowed in full, except painting or coating of bottom, from which one-third is to be deducted.
Between 1 and 3 years (B.)	One-third to be deducted off repairs to and renewal of Boilers and their mountings, Woodwork of Hull, Masts and Spars, Furniture, Upholstery, Crockery, Metal, and Glassware, also Sails, Rigging, Ropes, Sheets, and Hawsers (other than wire and chain), Awnings, Covers, and Painting. One-sixth to be deducted off Wire Rigging, Ropes, and Hawsers, Chain Cables and Sheets, Donkey Engines, Steam Winches, Steam Cranes and connexions; other repairs in full.
Between 3 and 6 years (C.)	Deductions as above under Clause **B**, except that one-sixth be deducted off Ironwork of Masts and Spars, and Machinery other than boilers.
Between 6 and 10 years (D.)	Deductions as above under Clause **C**, except that one-third be deducted off Ironwork of Masts and Spars, repairs to and renewal of all Machinery and all Hawsers, Ropes, Sheets, and Rigging; one-sixth to be deducted off Chains and Cables.

After 10 years (E.)	One-third to be deducted off all repairs and Renewals, except Ironwork of Hull and cementing. Anchors to be allowed in full. One-sixth to be deducted off Chain Cables.
Generally (F.)	The deductions (except as to Provisions and Stores, Machinery, and Boilers) to be regulated by the age of the vessel, and not the age of the particular part of her to which they apply. No painting bottom to be allowed if the bottom has not been painted within six months previous to the date of accident. No deduction to be made in respect of old material which is repaired without being replaced by new, and Provisions and Stores which have not been in use.

Freight Sacrificed: Amount to be made good in General Average.

That the loss of freight to be made good in general average shall be ascertained by deducting from the amount of gross freight lost, the charges which the owner thereof would have incurred to earn such freight, but has, in consequence of the sacrifice, not incurred.

Basis of Contribution to General Average.

When property saved by a general average act is injured or destroyed by subsequent accident, the contributing value of that property to a general average which is less than the total contributing value, shall, when it does not reach the port of destination, be its actual net proceeds; when it does it shall be its actual net value at

the port of destination on its delivery there; and in all cases any values allowed in general average shall be added to and form part of the contributing value as above.

The above rule shall not apply to adjustments made before the adventure has terminated.

Contributory Value of Ship.

That in any adjustment of general average there shall be set forth the certificate on which the contributory value of the ship is based, or, if there be no such certificate, the information adopted in lieu thereof, and any amount made good shall be specified.

Contributory Value of Freight.

That freight at the risk of the shipowner shall contribute to general average upon its gross amount, deducting the whole of, and no more than, such port charges as the shipowner shall incur after the date of the general average act, and such wages of the crew as the shipowner shall become liable for after that date.

That in any adjustment of general average there shall be set forth the amount of the gross freight and the freight advanced, if any; also the port charges and wages deducted, and any amount made good.

Vessel in Ballast and under Charter: Contributing Interests.

That when a vessel is in ballast and under charter, the interests contributing to expenses or sacrifices incurred for the common safety are, in practice, the ship and the freight she is earning under the charter, computed as usual in the adjustment of general average, unless the

expenses are salvage expenses specifically charged by a Court of Law or by arbitration to the vessel without any regard to the freight.

Chartered Freight (ulterior): Contribution to General Average.

That when at the time of a general average act the vessel has on board cargo shipped under charter-party or bills of lading, and is also under a separate charter to load another cargo after the cargo then in course of carriage has been discharged, the ulterior chartered freight shall not contribute to the general average.

Deductions from Freight at Charterer's Risk.

That freight at the risk of the charterer shall be subject to no deduction for wages and port charges, except in the case of charters in which the wages or port charges are payable by the charterer, in which case such freight shall be governed by the same rule as freight at the risk of the shipowner.

Forwarding Charges on Advanced Freight.

That in case of wreck, the cargo being forwarded to its destination, the charterer, who has paid a lump sum on account of freight, which is not to be returned in the event of the vessel being lost, shall not be liable for any portion of the forwarding freight and charges, when the same are less than the balance of freight payable to the shipowner at the port of destination under the original charter-party.

Adjustment: Policies of Insurance and Names of Underwriters.

That no statement shall be drawn up showing the amount of payments by or to the underwriters, excluding

statements of particular average on ship now dealt with by rule of the Association, unless the policies, or copies of policies of insurance, or certificates of insurance, for which the statement is required, be produced to the adjusters; and that such statement shall give the names of the underwriting firms and companies interested, and the amounts due on the respective policies produced.

Sacrifice for the Common Safety. Direct Liability of Underwriters.

That in case of general average sacrifice there is, under ordinary policies of insurance, a direct liability of an underwriter on ship for loss of or damage to ship's materials, and of an underwriter on goods or freight, for loss of or damage to goods or loss of freight so sacrificed as a general average loss; that such loss not being particular average is not taken into account in computing the memorandum percentages, and that the direct liability of an underwriter for such loss is consequently unaffected by the memorandum or any other warranty respecting particular average.

Enforcement of General Average Lien by Shipowners.

That in all cases where general average damage to ship is claimed direct from the underwriters on that interest, the average adjusters shall ascertain whether the shipowners have taken the necessary steps to enforce their lien for general average on the cargo, and shall insert in the average statement a note giving the result of their inquiries.

Underwriters' Liability (*Custom of Lloyd's*, 1876).

If the ship or cargo be insured for more than its contributory value, the underwriter pays what is assessed on

the contributory value. But where insured for less than the contributory value, the underwriter pays on the insured value; and when there has been a particular average for damage which forms a deduction from the contributory value of the ship that must be deducted from the insured value to find upon what the underwriter contributes.

This rule does not apply to foreign adjustments, when the basis of contribution is something other than the net value of the thing insured

The Duty of Adjusters in Cases involving Refunds of General Average Deposits or Apportionment of Salvage, Collision Recoveries, or other Funds.

That in cases of general average where deposits have been collected and it is likely that repayments will have to be made, measures be taken by the adjuster to ascertain the names of underwriters who have reimbursed their assured in respect of such deposits; that the names of any such underwriters be set forth in the adjustment as claimants of refund, if any, to which they are apparently entitled; and that on completion of the adjustment, notice be sent to all underwriters whose names are so set forth as to any refund of which they appear as claimants and as to the steps to be taken in order to obtain payment of the same.

That in cases where the names of any underwriters are not to be ascertained on completion of the adjustment, notice be sent to the Secretary of Lloyd's, to the Institute of London Underwriters, to the Liverpool Underwriters' Association, and to the Association of Underwriters of Glasgow, notifying such interests as have not been appropriated to underwriters.

And that in cases of apportionment of salvage or other

funds for distribution, similar measures be taken by the adjuster to safeguard the interests of any underwriters who may be entitled to benefit under the apportionment.

"Memorandum" to Statements showing Refunds in respect of General Average Deposits.

That the following memorandum shall appear at the end of statements which show refunds to be due in respect of General Average Deposits, viz. :—

Memorandum—Refunds of General Average Deposits shown in this statement should only be paid on production of the "original" deposit receipts.

YORK-ANTWERP RULES—

Modification of York-Antwerp Rules in Contracts of Affreightment : Liability of Underwriters.

That in all cases where the contract of affreightment provides for the application of York-Antwerp Rules in any modified or mutilated form, and when the policies of insurance provide for the application of York-Antwerp Rules, if in accordance with the contract of affreightment, in applying the claim to such policies no effect shall be given to York-Antwerp Rules.

Allowance to be made in General Average under York-Antwerp Rules in respect of the Cost of Maintenance of Officers and Crew.

That the amount to be allowed in general average under York-Antwerp Rules for the maintenance of officers and crew shall be the actual cost of such maintenance where proved; but where proof of actual cost is not furnished to the adjuster, the allowance shall be determined by the under-mentioned scale; provided that

where evidence of cost is produced, but is not conclusive, the allowance shall represent as nearly as possible the actual cost, but shall not exceed the under-mentioned scale, viz.—

	Officers * per man per day	Crew † per man per day
Passenger Steamer (Liners) . .	4/-	1/3
Passenger Sailing Vessels . .	3/-	1/3
Cargo Steamers and Sailing Vessels	2/6	1/3

except that the allowance for Lascars shall be 9*d.* per man per day, and in the case of other Asiatic (native) Crews shall be determined by the circumstances of each case.

* To include the master, deck officers, and engineers (in the case of a steamer), also the doctor and purser (if carried).
† To include the remainder of the ship's company.

PARTICULAR AVERAGE ON SHIP—

Statement of Particular Average on Ships.

That claims for particular average on ships shall not be stated unless the policies or copies of policies of insurance, for claiming on which the statement is required, be produced to the adjusters.

That such statements shall give the names of the underwriting firms and companies interested, and the amounts payable on the respective policies produced.

Apportionment of Costs in Collision Cases.

That when a vessel sustains and does damage by collision, and litigation consequently results for the purpose of testing liability, the technicality of the vessel having been plaintiff or defendant in the litigation shall not necessarily govern the apportionment of the costs of

such litigation, which shall be apportioned between claim and counter-claim in proportion to the amount which has been or would have been allowed in respect of each in the event of the claim or counter-claim being established; provided that when a claim or counter-claim is made solely for the purpose of defence, and is not allowed, the costs apportioned thereto shall be treated as costs of defence.

Expenses of Removing a Vessel for Repair.

Where a vessel is in need of repair at any port, and is removed thence to some other port for the purpose of repairs, either because the repairs cannot be effected, or cannot be effected prudently—

(*a*) The necessary expenses incurred in moving the vessel to the port of repair shall be allowed as part of the cost of repair, and where the vessel after repairing forthwith returns to the port from which she was removed, the necessary expenses incurred in so returning shall also be allowed.

(*b*) Where by moving the vessel to the port of repair any new freight is earned, or any expenses are saved in relation to the current voyage of the vessel, such net earnings or savings shall be deducted from the expenses of moving her, and where the vessel loads a new cargo at the port of repair no expenses subsequent to the completion of repair shall be allowed.

The expenses of removal include the cost of temporary repair, ballasting, wages and provisions of crew and/or runners, pilotage, towage, extra marine insurance, port charges, and, in case of a steamer, coal and engine-room stores.

(*c*) This rule shall not admit any ordinary expenses

incurred in fulfilment of a contract of affreightment, though such expenses are increased by the removal to a port of repair.

Coals and Stores used in Repair of Damage to the Hull.

That the cost of replacing coals and engine-room stores consumed either in the repair of damage to a steamer, in working the engines or winches to assist in the repairs of damage, or in moving her to a place of repair within the limits of the port where she is lying, shall be charged to the underwriters on ship as particular average.

Rigging chafed (*Custom of Lloyd's*, 1876).

Rigging injured by straining or chafing is not charged to underwriters, unless such injury is caused by blows of the sea, grounding, or contact; or by displacement, through sea peril, of the spars, channels, bulwarks, or rails.

Sails split or blown away (*Custom of Lloyd's*, 1876).

Sails split by the wind, or blown away while set, unless occasioned by the ship's grounding or coming into collision, or in consequence of damage to the spars to which the sails are bent, are not charged to underwriters.

Scraping and Painting.

That when in consequence of damage by a peril insured against, a vessel's bottom has to be scraped and painted, the cost of such scraping and painting shall be charged to underwriters on ship, without any deduction on account of the vessel having become due for ordinary painting at any time subsequent to the accident.

Dry Dock Expenses.

That where repairs on owner's account which are immediately necessary to make the vessel seaworthy and which can only be effected in dry dock are executed

concurrently with other repairs, for the cost of which the underwriters are liable, and which also can only be effected in dry dock, the cost of entering and leaving the dry dock, in addition to so much of the dock dues as is common to both repairs, shall be divided equally between the shipowner and the underwriters.

Deduction of One-Third (Custom of Lloyd's Amended 1890–91).

(1876) The deduction for new work in place of old is fixed by custom at one-third, with the following exceptions—

Anchors are allowed in full. Chain cables are subject to one-sixth only.

Metal sheathing is dealt with, by allowing in full the cost of a weight equal to the gross weight of metal sheathing stripped off, minus the proceeds of the old metal. Nails, felt, and labour metalling are subject to one-third.

The rule applies to iron as well as to wooden ships, and to labour as well as material. It does not apply to the expense of straightening bent ironwork, and to the labour of taking out and replacing it.

It does not apply to graving dock expenses and removals, cartages, use of shears, stages, and graving dock materials.

It does not apply to a ship's first voyage.

(1890–91) N.B.—Articles belonging to, or repairs done to, a ship, other than an iron ship, allowed in general average, are subject to similar deductions in respect to new for old materials as are made in adjusting claims of particular average on ship.

PARTICULAR AVERAGE ON GOODS—

Adjustment on Bonded Prices (Custom of Lloyd's, 1876).

In the following cases it is customary to adjust particular average on a comparison of bonded, instead of duty-paid prices—

In claims for damage to tea, tobacco, coffee, wine, and spirits imported into this country.

Adjustment of Average on Goods sold in Bond.

That in consequence of the facilities generally offered to bond goods at their destination, on which terms they are often sold, the term "Gross Proceeds" shall, for the purpose of adjustment, be taken to mean the price at which the goods are sold to the consumer, after payment of freight and landing charges, but exclusive of Customs duty, in cases where it is the custom of the port to sell or deal with the goods in bond.

Apportionment of Insured Value of Goods.

That where different qualities or descriptions of cargo are valued in the policy at a lump sum, such sum shall, for the purpose of adjusting claims, be apportioned on the invoice values where the invoice distinguishes the separate values of the said different qualities or descriptions; and over the net arrived sound values in all other cases.

Under-insured Interest made good in General Average.

That an underwriter who has paid for loss by jettison of the thing insured, is entitled, in the proportion that the sum insured bears to the policy value, to whatever is recovered in general average in respect to such loss, although the amount so recovered may exceed the amount paid by him.

Allowance for Water in Picked Cotton (*Custom of Lloyd's*, 1876).

When bales of cotton are picked, and the pickings are sold wet, the allowance for water in the pickings (where there are no means of ascertaining it) is by custom fixed at one-third.

Allowance for Water in Cut Tobacco (*Custom of Lloyd's*, 1876).

When damaged tobacco is cut off, the allowance for water in the cuttings is one-fourth.

Allowance for Water in Wool (*Custom of Lloyd's*, 1876).

Damaged wool from Australia, New Zealand, and the Cape is subject to a deduction of 3 per cent. for wet, if the actual increase cannot be ascertained.

Franchise Charges (*Custom of Lloyd's*, 1876).

The expenses of protest, survey, and other proofs of loss, including the commission or other expenses of a sale by auction, are not admitted to make up the percentage of a claim; and are only paid by the underwriters in case the loss amounts to a claim without them.

Extra Charges (*Custom of Lloyd's*, 1876).

Extra charges payable by underwriters, when incurred at the port of destination, are recovered in full; but when charges of the same nature are incurred at an intermediate port they are subjected to the same treatment, in respect of insured and contributory values, as general average charges.

Adjustment of Return of Premium (*Custom of Lloyd's*, 1876).

When the words "and arrival" follow the stipulation for a return of premium on a policy on goods, the particular average, but not the special charges, is deducted from the amount insured to arrive at the amount on which the return is taken.

APPENDIX E

YORK-ANTWERP RULES, 1890

Rule I.—Jettison of Deck Cargo

No jettison of deck cargo shall be made good as general average.

Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel.

Rule II.—Damage by Jettison and Sacrifice for the Common Safety

Damage done to a ship and cargo, or either of them, by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches or other opening made for the purpose of making a jettison for the common safety, shall be made good as general average.

Rule III.—Extinguishing Fire on Shipboard

Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average; except that no compensation shall be made for damage to such

portions of the ship and bulk cargo, or to such separate packages of cargo, as have been on fire.

Rule IV.—Cutting away Wreck

Loss or damage caused by cutting away the wreck or remains of spars, or of other things which have previously been carried away by sea-peril, shall not be made good as general average.

Rule V.—Voluntary Stranding

When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would inevitably sink, or drive on shore or on rocks, no loss or damage caused to the ship, cargo, and freight, or any of them, by such intentional running on shore shall be made good as general average. But in all other cases where a ship is intentionally run on shore for the common safety, the consequent loss or damage shall be allowed as general average.

Rule VI.—Carrying Press of Sail.—Damage to or Loss of Sails

Damage to or loss of sails and spars, or either of them, caused by forcing a ship off the ground or by driving her higher up the ground, for the common safety, shall be made good as general average ; but where a ship is afloat, no loss or damage caused to the ship, cargo, and freight, or any of them, by carrying a press of sail, shall be made good as general average.

Rule VII.—Damage to Engines in Refloating a Ship

Damage caused to machinery and boilers of a ship, which is ashore and in a position of peril, in endeavouring to refloat, shall be allowed in general average, when

shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage.

Rule VIII.—Expenses lightening a Ship when Ashore, and Consequent Damage

When a ship is ashore, and, in order to float her, cargo, bunker coals, and ship's stores, or any of them are discharged, the extra cost of lightening, lighter hire, and reshipping (if incurred), and the loss or damage sustained thereby, shall be admitted as general average.

Rule IX.—Cargo, Ship's Materials, and Stores burnt for Fuel

Cargo, ship's materials, and stores, or any of them necessarily burnt for fuel for the common safety at a time of peril, shall be admitted as general average, when and only when an ample supply of fuel had been provided; but the estimated quantity of coals that would have been consumed, calculated at the price current at the ship's last port of departure at the date of her leaving shall be charged to the shipowner and credited to the general average.

Rule X.—Expenses at Port of Refuge, etc.

(*a*) When a ship shall have entered a port or place of refuge, or shall have returned to her port or place of loading, in consequence of accident, sacrifice, or other extraordinary circumstances, which render that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such

port or place, consequent upon such entry or return, shall likewise be admitted as general average.

(*b*) The cost of discharging cargo from a ship, whether at a port or place of loading, call, or refuge, shall be admitted as general average, when the discharge was necessary for the common safety or to enable damage to the ship caused by sacrifice or accident during the voyage, to be repaired, if the repairs were necessary for the safe prosecution of the voyage.

(*c*) Whenever the cost of discharging cargo from a ship is admissible as general average, the cost of reloading and storing such cargo on board the said ship, together with all storage charges on such cargo, shall likewise be so admitted. But when the ship is condemned or does not proceed on her original voyage, no storage expenses incurred after the date of the ship's condemnation, or of the abandonment of the voyage, shall be admitted as general average.

(*d*) If a ship under average be in a port or place at which it is practicable to repair her, so as to enable her to carry on the whole cargo, and if, in order to save expenses, either she is towed thence to some other port or place of repair, or to her destination, or the cargo or a portion of it is transhipped by another ship, or otherwise forwarded, then the extra cost of such towage, transhipment and forwarding, or any of them (up to the amount of the extra expense saved) shall be payable by the several parties to the adventure in proportion to the extraordinary expense saved.

Rule XI.—Wages and Maintenance of Crew in Port of Refuge, etc.

When a ship shall have entered or been detained in any port or place under the circumstances, or for the

purpose of the repairs, mentioned in Rule X., the wages payable to the master, officers, and crew, together with the cost of maintenance of the same, during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted as general average. But when the ship is condemned, or does not proceed on her original voyage, the wages and maintenance of the master, officers, and crew incurred after the date of the ship's condemnation or of the abandonment of the voyage, shall not be admitted as general average.

Rule XII.—Damage to Cargo in discharging, etc.

Damage done to or loss of cargo necessarily caused in the act of discharging, storing, reloading, and stowing shall be made good as general average, when and only when the cost of those measures respectively is admitted as general average.

Rule XIII.—Deductions from Cost of Repairs

In adjusting claims for general average, repairs to be allowed in general average shall be subject to the following deductions in respect of "new for old," viz.—

In the case of **iron or steel ships**, from date of original register to the date of accident—

Up to 1 year old (A.)	All repairs to be allowed in full, except painting or coating of bottom, from which one-third is to be deducted.

Between 1 and 3 years (B.)	One-third to be deducted off repairs to and renewal of Woodwork of Hull, Masts and Spars, Furniture, Upholstery, Crockery, Metal and Glassware, also Sails, Rigging, Ropes, Sheets, and Hawsers (other than wire and chain), Awnings, Covers and painting. One-sixth to be deducted off Wire Rigging, Wire Ropes and Wire Hawsers, Chain Cables and Chains, Donkey Engines, Steam Winches and connexions, Steam Cranes and connexions; other repairs in full.
Between 3 and 6 years (C.)	Deductions as above under Clause **B**, except that one-sixth be deducted off Ironwork of Masts and Spars, and Machinery (inclusive of boilers and their mountings).
Between 6 and 10 years (D.)	Deductions as above under Clause **C**, except that one-third be deducted off Ironwork of Masts and Spars, repairs to and renewal of all Machinery (inclusive of boilers and their mountings), and all Hawsers, Ropes, Sheets, and Rigging.
Between 10 and 15 years (E.)	One-third to be deducted off all repairs and renewals, except Ironwork of Hull and Cementing and Chain Cables, from which one-sixth to be deducted. Anchors to be allowed in full.
Over 15 years (F.)	One-third to be deducted off all repairs and renewals. Anchors to be allowed in full. One-sixth to be deducted off Chain Cables.

Generally (G.)

The deductions (except as to Provisions and Stores, Machinery, and Boilers) to be regulated by the age of the ship, and not the age of the particular part of her to which they apply. No painting bottom to be allowed if the bottom has not been painted within six months previous to the date of accident. No deduction to be made in respect of old material which is repaired without being replaced by new, and Provisions and Stores which have not been in use.

In the case of **wooden or composite ships**—

When a ship is under one year old from date of original register, at the time of accident, no deduction new for old shall be made. After that period a deduction of one-third shall be made, with the following exceptions—

Anchors shall be allowed in full. Chain cables shall be subject to a deduction of one-sixth only.

No deduction shall be made in respect of provisions and stores which had not been in use.

Metal sheathing shall be dealt with, by allowing in full the cost of a weight equal to the gross weight of metal sheathing stripped off, minus the proceeds of the old metal. Nails, felt, and labour metalling are subject to a deduction of one-third.

In the case of **ships generally**—

In the case of all ships, the expense of straightening bent ironwork, including labour of taking out and replacing it, shall be allowed in full.

Graving dock dues, including expenses of removals, cartages, use of shears, stages, and graving dock materials, shall be allowed in full.

Rule XIV.—Temporary Repairs

No deductions "new for old" shall be made from the cost of temporary repairs of damage allowable as general average.

Rule XV.—Loss of Freight

Loss of freight arising from damage to or loss of cargo shall be made good as general average, either when caused by a general average act, or when the damage to or loss of cargo is so made good.

Rule XVI.—Amount to be made good for Cargo lost or damaged by Sacrifice

The amount to be made good as general average for damage or loss of goods sacrificed shall be the loss which the owner of the goods has sustained thereby, based on the market values at the date of the arrival of the vessel or at the termination of the adventure.

Rule XVII.—Contributory Values

The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure, to which shall be added the amount made good as general average for property sacrificed; deduction being made from the shipowner's freight and passage-money at risk, of such port charges and crew's wages as would not have been incurred had the ship and cargo been totally lost at the date of the general average act or sacrifice, and have not been allowed as general average; deduction being also made from the value of the property of all charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average.

Passengers' luggage and personal effects, not shipped under bill of lading, shall not contribute to general average.

Rule XVIII.—Adjustment

Except as provided in the foregoing rules, the adjustment shall be drawn up in accordance with the law and practice that would have governed the adjustment had the contract of affreightment not contained a clause to pay general average according to these Rules.

APPENDIX F

SINCE the completion of this Edition the following clauses for use in connection with cargo insurances have been suggested for general adoption on and after August 1, 1912, viz. :— A.D. 1912.

Warranted free of capture seizure and detention, and the consequences thereof or any attempt thereat, *piracy excepted*, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war. F. C. & S. clause.

Warranted free of loss or damage caused by strikers locked out workmen or persons taking part in labour disturbances or riots or civil commotions. Strikes, riots and civil commotions clause.

General Average and Salvage Charges payable according to Foreign Statement or per York-Antwerp Rules if in accordance with the contract of affreightment. G/A clause.

Held covered, at a premium to be arranged, in case of deviation or change of voyage or of any omission or error in the description of the interest, vessel, or voyage. Deviation clause.

Including (subject to the terms of the Policy) all risks covered by this Policy from shippers' or manufacturers' warehouse until on board the vessel, during transhipment if any, and from the vessel whilst on quays wharves or in sheds during the ordinary course of transit until safely deposited in consignees' or other warehouse at destination named in Policy. Warehouse to warehouse clause.

A.D. 1912.

Craft, &c., clause. Including risk of craft, raft, and/or lighter to and from the vessel. Each craft, raft, and/or lighter to be deemed a separate insurance. The Assured are not to be prejudiced by any agreement exempting lightermen from liability.

Bill of Lading, &c., clause. Including all liberties as per contract of affreightment. The Assured are not to be prejudiced by the presence of the negligence clause and/or latent defect clause in the Bills of Lading and/or Charter Party. The seaworthiness of the vessel as between the Assured and the Assurers is hereby admitted.

F. P. A. clause. Warranted free from Particular Average unless the vessel or craft be stranded sunk or burnt, but the Assurers are to pay the insured value of any package or packages which may be totally lost in loading transhipment or discharge, also any loss of or damage to the interest insured which may reasonably be attributed to fire collision or contact of the vessel and/or craft and/or conveyance with any external substance (ice included) other than water, or to discharge of cargo at a port of distress, also to pay landing warehousing forwarding and special charges if incurred.

INDEX

Richard Clay & Sons, Limited, London and Bungay.

The Students' Guide to Life Assurance

With Chapters on Fire, Workmen's Compensation, and other kinds of Insurance

By A. W. TARN, F.I.A.

Editor of "Walford's Insurance Guide and Handbook"

Crown 8vo, 224 pp. Price 3s. 6d.

"The information contained in this book is of that practical nature which every member of the inside staff, at any rate, of an insurance company transacting Life Assurance business, should endeavour to acquire in order that the discharge of his daily duties may be intelligent, and his knowledge of his own particular department linked on to a broad conception of the work of the office as a whole."—*Post Magazine.*

"To write upon such a highly technical subject as Life Assurance in a style which, while employing language readily understood by the student at the commencement of his studies, will, at the same time, convey a more than superficial acquaintance with the topic and induce a desire for further knowledge, is no easy task, but Mr A. W. Tarn, F.I.A., readily overcomes the difficulty in this book. . . . The task has been most excellently performed."—*The Insurance Record*

"This is a book which should be a success from all points of view. There is not the slightest doubt that it will serve its purpose as set forth in the preface, and to young men desirous of getting on in the insurance profession it is likely to prove of invaluable service."—*The Policy Holder.*

"It is likely in time to be regarded as a standard work."—*The Accountants' Magazine.*

Book-keeping and Accounts

A Text-book for Students

By L. C. CROPPER, F.C.A.

Senior Examiner to the London Chamber of Commerce; an Examiner to the Royal Society of Arts; late Lecturer to the Chartered Accountants' Students' Society of London; Author of "The Primer of Book-keeping" and "Elementary Book-keeping."

Crown 8vo, 912 pp. Cloth. Price 3s. 6d. net.

RECOMMENDED BY THE INSTITUTE OF BANKERS

This is an exhaustive and, as might be expected, a thoroughly authoritative treatise covering the whole subject.

"The first thing that strikes us about this book is that it deals with the subject *as it is treated in actual practice.* . . . Notwithstanding the many publications on Book-keeping now on the market, Mr Cropper's book, which extends to some 912 pages, must be regarded as an addition to accountancy literature, possessing distinct value to the student."—*The Incorporated Accountants' Journal.*

"It does not often happen that a practising accountant has had the varied experience as examiner and tutor that Mr. Cropper has before publishing his first book. It is only to be expected that the reader should profit from this delay, and that will certainly be the case with those who acquire Mr. Cropper's book, for throughout it bears the impress of experience. His readers will find themselves in safe hands, and can rest assured that they will not learn from the work methods which presently they will have to unlearn."
—*The Accountant.*

"It is, we say at once, one of the best, if not absolutely the best work on the subject we have seen . . . We strongly commend it to the notice of all—whether teachers or students."—*The Schoolmaster.*

MACDONALD & EVANS, 4 ADAM ST., ADELPHI, LONDON, W.C.

A Plain Guide to Investment and Finance

By T. E. YOUNG, B.A., F.I.A.

Past President of the Institute of Actuaries, Past Chairman of the Life Offices' Association, late Head Actuary of the Commercial Union Assurance Co.

Crown 8vo, 350 pp., cloth. Second Edition. Price 5s.

A **few** *of the subjects dealt with:*—Trade, Commerce and Industry—Markets generally and the Money Market in particular—Bank of England—Joint Stock Banks—Bills of Exchange—Foreign Exchanges—Bill Brokers—Stock Exchange—Brokers and Jobbers—Bulls and Bears—Sympathy of Markets—Causes of the Variations in the Prices of Securities—Effects of War on the Prices of Securities—Dear and Cheap Money—Condition of Trade in its Effect on the Prices of Securities and Consols—Accrued Interest as affecting the Cost of Securities—The Return derived from an Investment—Ex-Dividend and Ex-Interest, Cum Dividend and Cum Interest—Sinking Funds, Speculations and Gambling—The Phase of Commercial Crises in the Course of Trade, and the Succession of Sun Spots—Index Numbers, etc.

"It is carefully and lucidly written, and any one who desires to get a comprehensive grasp of the financial world at large and of the Stock and Money Markets particularly, cannot secure a better or more reliable guide."—*Financial Times*, Jan. 4th, 1909.

"Regarded from every point of view this work is really admirable, and the reader cannot fail to profit very greatly from its clear exposition."—*The Financier.*

"Mr. Young's book truly fulfils the office of guide. A child could understand its simple explanations. Everything that it is necessary for one to know is expounded clearly and concisely, and the varying influences to which the investment market is subject are shown. The book is a veritable *vade mecum*, and all interested in finance and financial operations should not be without it."—*The Financial Standard.*

"We are glad to testify with emphasis to the excellence of this manual. It is one of the soundest, most carefully written, honest, and lucid manuals on the subject dealt with we have ever come across."—*The Investor's Review.*

"This is a book which would amply merit more than one notice. No other author is better equipped than Mr. Young to supply a real and wide knowledge. Nothing superficial will ever be found in his pages. . . . To sum up, we give a most cordial welcome to a very valuable book. The man who relies on his experience will learn much from its exposition of principles, and the student who resorts to it to equip himself in principle will find abundant assistance to him in the at first bewildering work of practice."
—*Post Magazine and Insurance Monitor.*

"The style is invariably clear and interesting; and as the book is the outcome of long experience, it should be found of service both by those who have money to invest and by the ordinary student of economics."—*The Scotsman* (Edinburgh).

"We must highly commend Mr. T. E. Young's 'A Plain Guide to Investment and Finance' for its sound reasoning, solid good sense, and wise discrimination."
—*The Liverpool Post.*

"It is a remarkable book in many ways, and is thoroughly worth the price asked. It should find a place on every business man's desk, for there is certain to be something in it that can be learned with advantage."—*The Review.*

"Mr. Young's name is familiar to everybody in the life assurance world, where he has made a reputation for sound judgment and an absolute mastery of his profession. . . . From start to finish his book is couched in simple language, with explanations of the few technical terms in footnotes. . . . It is excellently written."—*The Policy.*

MACDONALD & EVANS, 4 ADAM ST., ADELPHI, LONDON, W.C.